89-601

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

MARIE LUCIE JEAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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123 pp

QUESTION PRESENTED

Whether—in a case where it is determined that the government was not substantially justified on the merits and is therefore liable for fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987)—the government must automatically pay fees incurred in litigating the fee award without a separate inquiry into whether the government's position in the fee litigation was substantially justified.

PARTIES TO THE PROCEEDINGS

Petitioners, who were defendants in the district court and appellants in the court of appeals, are the Commissioner of the Immigration and Naturalization Service; the District Director of INS, District VI; the Assistant District Director for Deportation, INS, District VI; Officer in Charge, Krome Avenue North Detention Facility; the INS; and the Attorney General of the United States. Respondents, who were plaintiffs in the district court and appellees in the court of appeals, are Lucien Louis, Jean Louis Servebien, Pierre Silien, Wilner Luberisse, Job Dessin, Serge Verdieu, Milfort Vilgard, Joel Casimir, and Prophete Talleyrand, on behalf of themselves and all others similarly situated; and the Haitian Refugee Center, Inc.*

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* Marie Lucie Jean and Herold Jacques were named as petitioners in an earlier habeas corpus petition, but their names were not included in the second amended class action complaint.

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v.

MARIE LUCIE JEAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of the Immigration and Naturalization Service, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 863 F.2d 759. The opinion of the district court (App., *infra*, 46a-99a) is reported at 646 F. Supp. 1300.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1988 (App., *infra*, 100a-101a). A petition

for rehearing was denied on May 17, 1989 (App., *infra*, 102a-103a). On August 10, 1989, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including September 14, 1989, and on September 12, 1989, he further extended it to and including October 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. 2412(d) (1982 & Supp. V 1987), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> * * * * *
>
> (2) For the purposes of this subsection—
>
> (A) "fees and other expenses" includes * * * reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that * * * (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)[.]
>
> * * * *
>
> (D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based[.]

STATEMENT

1. Congress enacted the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987), "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States." Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325. The Act does not, however, mandate automatic fee-shifting. Instead, it provides that a court "shall award" fees to any party meeting specified qualifications (see 28 U.S.C. 2412(d)(2)(B) (1982 & Supp. V 1987)) that prevails in a civil nontort action against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A) (1982 & Supp. V 1987).

2. This attorney's fee dispute arises out of a class action brought in 1981 by respondents, as representatives of certain Haitian aliens detained by the INS[1], to challenge a

[1] The district court certified a class consisting of all Haitian aliens who arrived in the Southern District of Florida on or after May 20, 1981, who were applying for entry into the United States and who were presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion had not been entered and who were either: (1) unrepresented by counsel; or (2)

revised parole policy instituted by the Immigration and Naturalization Service in that year. Respondents' complaint, as amended, contained seven counts, each alleging a separate cause of action; Count 2 alleged that the new parole policy constituted a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and that the government's failure to follow APA rulemaking procedures rendered that policy unenforceable. The other counts alleged a number of other constitutional and procedural violations of respondents' rights.[2]

Before trial, the district court dismissed on jurisdictional grounds all of respondents' claims except those based on the APA and the Fifth and the First Amendments. *Louis* v. *Nelson*, 544 F. Supp. 973, 983 n.25 (S.D. Fla. 1982). After a five-week trial, it found respondents' constitutional claims to be without merit. *Id.* at 1001-1004. The district court ruled in favor of respondents on the APA claim, however, concluding that the revised

represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association. In its final judgment, the district court further modified the class certification by enlarging the class to include all detained Haitians for whom a counsel's notice of appearance form had been entered. *Louis* v. *Nelson*, 544 F. Supp. 1004, 1005, 1009 (S.D. Fla. 1982).

[2] Count 1 challenged the commencement of preliminary interviews of Haitian aliens without the presence of counsel or notice of the right to counsel; Count 3 challenged the failure to advise class members of their procedural rights at exclusion hearings; Count 4 challenged the denial of counsel; Count 5 challenged the denial of public exclusion hearings; Count 6 challenged the denial of the right to apply for political asylum; and Count 7 challenged the lawfulness of the program in its entirety under the equal protection component of the Fifth Amendment's Due Process Clause. *Louis* v. *Meissner*, 532 F. Supp. 881, 883-884 (S.D. Fla. 1982).

parole policy should have been promulgated in accordance with notice-and-comment rulemaking procedures. *Id.* at 993-997.[3]

Petitioners appealed the district court's APA ruling. Respondents cross-appealed, pressing their equal protection and First Amendment claims, as well as the claims that had been dismissed before trial.

A panel of the Eleventh Circuit affirmed the district court's judgment with regard to the APA claim, but with a different rationale.[4] In all other respects, it reversed the district court's post-trial judgment; in addition, it concluded that several of the claims should not have been dismissed before trial and remanded the case for further factual development. *Jean* v. *Nelson*, 711 F.2d 1455 (1983).

[3] The court subsequently declared that the new policy was "null and void" and that the prior policy was restored to "full force and effect". *Louis* v. *Nelson*, 544 F. Supp. 1004, 1006 (S.D. Fla. 1982). Accordingly, the court ordered that all class members in detention be released on parole under an interim plan, subject to certain terms and conditions. *Id.* at 1006-1009.

[4] The district court had relied (544 F. Supp. at 996-997) on criteria enunciated in *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 701-702 (5th Cir. 1979), and *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974), in rejecting petitioners' argument that the INS policy fit within the "general statement of policy" exception to the APA notice and comment requirement for rulemaking. The panel disagreed with those cases, and enunciated its own basis for affirming the district court's conclusion that no "general statement of policy" was involved here. It also stated, however, that "[i]n all fairness to the district court, analyzing a rule within the general statement of policy exception is akin to wandering lost in a Serbonian Bog. The term itself * * * offers little guidance. * * * The legislative history offers little guidance. * * * The Supreme Court has yet to offer a definitive test." 711 F.2d at 1480 (citations omitted).

The panel opinion was vacated when rehearing en banc was granted, 714 F.2d 96. The en banc court dismissed in part, reversed in part, and remanded with instructions. *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984). All members of the en banc court agreed that the APA claim was moot because petitioners had, subsequent to the district court's decision, promulgated regulations in accordance with the rulemaking provisions of the APA, and because the only persons remaining in detention in the wake of the district court's order granting parole "either had their parole revoked for failure to comply with the terms of the district court's order * * * or arrived in this country after the government's promulgation of its new regulations." *Id.* at 962. Accordingly, the en banc court dismissed the government's appeal as to the APA issue and remanded with directions "that the injunctive relief grounded on the claimed APA violation be vacated." *Id.* at 984.

The en banc court held that although the petitioners' parole policy was not subject to a constitutional due process attack, excludable aliens "do have rights * * * to whatever process Congress—and through its regulations and established policies, the Excutive branch—have extended them" (727 F.2d at 984). It accordingly remanded the case for further review under this standard. *Ibid.*

This Court granted respondents' petition for a writ of certiorari, which addressed only the equal protection issue. The Court found it unnecessary to reach that issue because the new regulations promulgated by the INS provided respondents with nondiscriminatory parole consideration—"all they seek to obtain by virtue of their constitutional argument." *Jean* v. *Nelson*, 472 U.S. 846, 855 (1985). The Court therefore affirmed the en banc court's judgment insofar as it remanded the case to the district court for a determination as to whether INS officials were

acting in compliance with the new regulations. On that remand respondents obtained no further relief.

3. On December 6, 1985, after the merits litigation had finally come to a close, the district court found that respondents were entitled to an award of fees, costs and expenses under the Equal Access to Justice Act, 28 U.S.C. 2412(d) (1982 & Supp. V 1987). App., *infra*, 88a-99a. Although recognizing that respondents did not prevail on their constitutional claims, the district court found that they were "prevailing parties" for purposes of EAJA because petitioners' appeal of the district court's APA finding was dismissed, and respondents obtained the "two primary goals" (*id.* at 89a-90a) of the litigation—"[petitioners] stopped the accelerated mass exclusion hearings and class members were released from indefinite incarceration" (*id.* at 90a-91a). The district court also found that petitioners' position on the APA issue was without substantial justification in law or fact (*id.* at 92a-95a).

After a hearing devoted to the reasonableness of the hours and the rates claimed, the district court issued a further order establishing the amount of the EAJA award to respondents (App., *infra*, 46a-87a).[5] In determining the numbers of hours reasonably expended in the litigation, the court considered and applied the factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). App., *infra*, 54a-67a. In addition, it concluded that "some award is in order for counsel's efforts in the Supreme Court," and awarded fees for 25% of the hours spent in that portion of the litigation. *Id.* at 69a-70a.

Turning to consideration of the hourly rates to be awarded, the court held that respondents were entitled to

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[5] The appended opinion is a revision of the one originally entered by the court on August 29, 1986. App., *infra*, 46a n.1.

rates in excess of the EAJA statutory cap of $75 an hour because of the cost of living and the limited availability of qualified counsel; it made no attempt to quantify the impact of either of these two factors. App., *infra*, 72a-74a. It then held that respondents were entitled to a 15% enhancement for four reasons: the pro bono publico nature of the case, the vindication of public rights, the emotional pressure on respondents' counsel and the government's litigious posture. *Id.* at 74a-77a. Finally, in awarding fees for the fee litigation, the court specifically relied (*id.* at 84a-85a) on the statement in *Haitian Refugee Center, Inc.* v. *Meese*, 791 F.2d 1489, 1500 (11th Cir. 1986) that "we * * * decline to hold that this court may award fees for fees only if the government's position in the fees litigation was not substantially justified."[6] It accordingly did not consider whether the government's position in the fee litigation was substantially justified. In total, the district court awarded respondents more than $1 million, including more than $101,500 for their work on the fee petition. App., *infra*, 85a, 86a-87a.

The Court of appeals affirmed the district court's determination that the government's position was not substantially justified (App., *infra*, 11a-17a),[7] but vacated and

[6] That portion of the *Haitian Refugee Center* opinion was subsequently vacated (*Haitian Refugee Center* v. *Meese*, 804 F.2d 1573, 1574 (11th Cir. 1986). See App., *infra*, 38a.

[7] Like the district court, the court of appeals reached this conclusion by focusing solely on the government's position on the APA issue. Despite its earlier recognition of the difficulty of this issue (see note 4, *supra*), the court of appeals refused to overturn the district court's finding that the government lacked substantial justification in taking the position that the statement of the new parole policy was not a "rule" subject to APA notice and comment requirements. App., *infra*, 13a-17a.

remanded for a recalculation of the award (*id.* at 41a). The court of appeals found that the district court had erred in awarding fees for respondents' unsuccessful Supreme Court litigation, because "[respondents] did not prevail on any legal issue or obtain any additional relief subsequent to our in banc court's decision." *Id.* at 18a-20a.

The court also disapproved the district court's determination of the appropriate hourly rates. It found, first, that the proper starting point was not with the factors listed in *Johnson* v. *Georgia Highway Express, Inc., supra*, but the prevailing market rates for services of the kind and quality provided. Even if the requested hourly rates did reflect prevailing market rates, "the district court must still find that a cost of living increase or a 'special factor' justifies hourly rates of more than $75 before it can award fees at a rate in excess of this figure." App., *infra*, 25a-26a. Here, the district court had failed to explain the basis for its cost of living adjustment in the fee award. The court of appeals then rejected three of the four factors that the district court had relied on—the pro bono nature of the case, the fact that public rights were vindicated, and the emotional hardship on respondents' counsel—to justify enhancement of the fee award. The panel majority did, however, conclude that the government's litigiousness in this case might be a special factor which would justify an increased award. *Id.* at 30a-33a. Although the court of appeals concluded that *Pierce* v. *Underwood*, 108 S. Ct. 2541 (1988), precluded consideration of the general level of competence of counsel or "a mere short supply of qualified lawyers willing to take a case at $75 an hour" (App., *infra*, at 28a) as a "special factor" justifying an enhanced hourly rate, it directed the district court to consider, upon remand, whether expertise in immigration law

or fluency in French and Haitian Creole constituted such "special factors". *Id.* at 28a-29a.[8]

Finally, the court of appeals concluded that the district court had not erred in awarding more than $100,000 in fees for work on the fee litigation without considering whether the government's position in that litigation was substantially justified. The court recognized the division in the circuits on this issue (App., *infra,* 38a), but agreed with the approach taken by the Second Circuit in *Trichilo* v. *Secretary of Health and Human Services*, 823 F.2d 702, 707 (1987), and concluded that "the government's position in the fee litigation is irrelevant to a determination whether a successful EAJA fee applicant can claim 'fees for fees,' " (App., *infra*, 39a-40a). The court expressly reserved the question "whether a 'technical defense' exception to this rule should exist" (*id.* at 41a n.14).[9]

REASONS FOR GRANTING THE PETITION

There are several significant errors in the opinion of the court of appeals.[10] We have nevertheless concluded that

[8] The dissent disagreed with the basis for the calculation of the cost of living adjustment, with the conclusion that the government's litigating posture might be a "special factor", and also with the conclusion that competence in immigration law might be such a factor. App., *infra,* 41a-45a.

[9] This reservation apparently referred to the court's prior discussion (App., *infra*, 39a) of *American Academy of Pediatrics* v. *Bowen*, 795 F.2d 211, 214 (1986), noting that in that case, the D.C. Circuit expressly permitted the government to "raise certain technical defenses, such as an untimely filing by the fee applicant, and defend against an application for 'fees for fees' on the ground that the technical defense is substantially justified."

[10] In addition to the "fees for fees" issue presented in this petition, we submit that the court misinterpreted EAJA's provision that no fee award should be made if "the position of the United States was substantially justified" (28 U.S.C. 2412(d)(1)(A) (1982 & Supp. V 1987). Although the United States prevailed on all the issues that were fully litigated in this case, the court below determined that the government's position was not "substantially justified" by focusing solely on the APA issue, which was dismissed as moot by the en banc court of appeals. Instead of giving determinative weight to this single issue, the court should have considered whether the government's *overall* position was reasonable – whether the government was "substantially (*i.e.*, for the most part) justified" (*Pierce* v. *Underwood*, 108 S. Ct. at 2550 n.2).

We also disagree with the court's suggestion that expertise in immigration law might be a "special factor" justifying an award at an hourly rate in excess of the statutory fee cap (cf. *Pierce* v. *Underwood*, 108 S. Ct. at 2554), and that the government's alleged litigiousness in this case might also be such a factor.

only one of those errors – the adoption of a "per se" rule for the award of fees for the fee litigation – merits this Court's attention at this time. There is a conflict in the circuits over the correct standard to be applied in determining whether to award such fees. That conflict warrants resolution by this Court because it is a source of continued litigation in the circuits that have not adopted a position on the issue. Moreover, the incorrect approach chosen by the court of appeals encourages unnecessary fee litigation that wastes the resources not only of the parties, but also of the courts.

1. As the Eleventh Circuit recognized in this case, there is a split among the circuits on the "fees for fees" issue. The Ninth, Eighth, Seventh and Fifth Circuits have refused to award EAJA prevailing parties fees for the fee litigation where the court has determined that the government's position in the fee litigation was substantially justified. *Rawlings* v. *Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984); *Cornella* v. *Schweiker*, 741 F.2d 170 (8th Cir. 1984); *Continental Web Press, Inc.* v. *NLRB*, 767 F.2d

321, 324 (7th Cir. 1985); *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1291 n.8 (5th Cir. 1985).[11]

The Eleventh Circuit in this case, following the lead of the Second Circuit in *Trichilo* v. *Secretary of Health and Human Services*, 823 F.2d 702 (1987), disagreed with this approach and adopted a "per se" rule, holding the government automatically liable for fees for the fee litigation whenever an EAJA award is made. The First Circuit has recently also adopted this position. *McDonald* v. *Secretary of Health and Human Services*, No. 88-2177 (Sept. 7, 1989).[12]

2. Nothing in the language or the legislative history of EAJA indicates that "fees for fees" should be awarded automatically whenever the government's position on the merits portion of the case is found to lack substantial justification. The statute simply provides that fees are to be awarded the prevailing party unless the "position of the United States" was substantially justified (28 U.S.C.

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[11] The Third Circuit suggested a different approach in *Russell* v. *Heckler*, 814 F.2d 148, 155 (1987), vacated on other grounds, 108 S. Ct. 2891 (1988). It stated that where the government's sole argument in the fee litigation is that it was substantially justified on the merits, and the court disagrees, the government will ordinarily be liable for fees for the fee litigation; but if the government's opposition is based on other contentions, the court should not award fees for the fee litigation if the government's position with respect to those issues is substantially justified. The Third Circuit has not had the occasion to adopt this rule in a subsequent opinion.

[12] In *American Academy of Pediatrics* v. *Bowen*, 795 F.2d 211, 213 (1986), the District of Columbia Circuit noted that in a previous decision (*Cinciarelli* v. *Reagan*, 729 F.2d 801 (1984)), it had "indicated a preference for the *per se* fee-shifting rule." The *American Academy of Pediatrics* court found it unnecessary to "definitively accept the *per se* rule suggested by *Cinciarelli*," stating that "[we] hold only that a technical defense exception, including at least the defense of untimely filing, should limit any fee-shifting rule." 795 F.2d at 213.

2412(d)(1)(A)); "position of the United States" is defined to include the position taken in the civil action and the action or failure to act upon which the civil action is based (28 U.S.C. 2412(d)(2)(D)). Nothing in the statute refers to the government's position in the fee litigation; there is certainly no suggestion that fees are to be paid for such litigation regardless of substantial justification.

Nor does the legislative history justify the court of appeals' expansive reading of the statute.[13] Congress amended the Act in 1985 to add the definition of the "position of the United States" out of concern that:

> If the government's litigation position was the sole consideration, the government could insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed "reasonable" litigation positions; thereby having the effect of substantially justifying their position. Interpreting the EAJA so as to restrict its application to mere litigation arguments and not the underlying action which made the suit necessary, would remove the very incentive for careful agency action that Congress hoped to create in 1980.

H.R. Rep. No. 120, 99th Cong., 1st Sess. 12 (1985) (citation omitted). That concern does not support a per se "fees for fees" rule. Fee litigation is separate from the merits portion of a case. If the agency conduct was unreasonable, the government will be liable for fees for the merits portion of the case. Similarly, if the government's position on the fees portion of the case is not substantially justified, the government will be held liable for fees for fees. But the "incentive for careful agency action" is in no way dimin-

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[13] Instead, EAJA must be narrowly construed because it is a limited waiver of sovereign immunity.

ished if the government is not required to pay "fees for fees" because its position in that portion of the case is substantially justified.

Indeed, the "per se" rule is inconsistent with the plain language and the purposes of EAJA, since it penalizes the government for raising arguments that are not only substantially justified, but are also correct. Cf. *Goldhaber* v. *Foley*, 698 F.2d 193, 197 (3d Cir. 1983); *Matthews* v. *United States*, 713 F.2d 677, 684 (11th Cir. 1983). EAJA was carefully crafted so that it would not deter the government from taking reasonable positions. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10-11, 13-14 (1980). It certainly should not be interpreted in a way that would penalize the government for making reasonable—even prevailing—arguments in opposition to any and all fee requests. In this case, for example, the government argued that respondents were not entitled to any compensation for their work before the Supreme Court. The court of appeals agreed. The government also pointed out that the district court had failed to quantify what portion of the increased hourly rate was due to an increase in the cost of living. The appellate court agreed with that contention as well. Finally, the court of appeals agreed with the government that the pro bono nature of the case, the fact that public rights were vindicated, and the emotional hardship on respondents' counsel did not constitute "special factors" justifying an enhanced fee award. Notwithstanding the fact that the government prevailed on each of these issues, the court of appeals has required the government to reimburse respondents for the attorney fees they incurred in these losing efforts.

3. The "per se rule" adopted by the court below will also encourage unnecessary fee litigation, thus further burdening the courts with what this Court in *Pierce* v. *Underwood*, 108 S. Ct. 2541, 2548 (1988), recognized as litigation unlikely to result in "law-clarifying benefits".

Prevailing parties will be encouraged to file unreasonable fee requests, since regardless of the merits of such requests, the government will have to bear all the costs of litigating them.[14] Indeed, as the dissent observed in *McDonald* v. *Secretary of Health and Human Services*, slip op. 40 "[t]he more esurient the request, the more likely the government will oppose it; the more heroic the opposition, the more time will reasonably be spent litigating the matter; the more protracted the litigation, the greater the number of hours reasonably expended on it; the more hours spent, the higher the fee award (notwithstanding whatever trimming may be done in the name of 'reasonableness')." No reasonable policy supports such an invitation to meritless litigation; yet that is precisely what the court of appeals' rule of automatic fees for fees does.

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[14] Similarly, the settlement of fee requests will be discouraged. For this reason, the "per se" rule will in fact tend to encourage the sort of "infinite regression of EAJA litigation" that concerned the court below (App., *infra*, 38a, quoting *Cinciarelli* v. *Reagan*, 729 F.2d 801, 810 (D.C. Cir. 1984)). In any event, the requirement that the reasonableness of the government's position on the fee request must be independently evaluated is unlikely to result in repeated appeals, since it is scarcely likely that such repeated appeals would be substantially justified. Moreover, the risks of litigation under that standard will encourage the parties to settle their fee disputes on a reasonable basis.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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OCTOBER 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 86-5887

MARIE LUCIE JEAN, ET AL., PLAINTIFFS-APPELLEES

v.

ALAN C. NELSON, ET AL., DEFENDANTS-APPELLANTS

Dec. 27, 1988

Appeal from the United States District Court
for the Southern District of Florida

Before KRAVITCH and CLARK, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

CLARK, Circuit Judge:

In another chapter of what has been a long, complex, and bitterly contested lawsuit, the United States has challenged an award of attorney's fees and costs pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Supplied with the Supreme Court's first EAJA decision, *Pierce v. Underwood*, ____ U.S. ____, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988), we have concluded that the district court did not abuse its discretion in finding that the plaintiffs are entitled to an award of attorney's fees, ex-

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

penses and costs. But because the district court's calculation of the award is inconsistent with certain standards set forth in *Pierce* and other case law, we are vacating its award and remanding the case for a recalculation of the award.

I. BACKGROUND

A. *Litigation on the Merits*

The facts concerning this case are well known. *See Louis v. Nelson*, 544 F.Supp. 973 (S.D.Fla.1982) (*Jean I*); *Jean v. Nelson*, 711 F.2d 1455 (11th Cir.1983) (*Jean II*), *vacated by reh'g in banc*, 727 F.2d 957 (11th Cir.1984) (*Jean III*), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) (*Jean IV*). For the purposes of the assessing the plaintiffs' right to attorney's fees and costs under the EAJA, we will detail only the nature and substance of their claims, and the results—both judicial and extra-judicial—that they obtained.

The lawsuit began as a challenge to the practice, instituted by the Immigration and Naturalization Service (INS), of holding mass exclusion hearings for the plaintiff class composed of Haitian refugees. It evolved quickly into a broad-based challenge to INS's policy of detaining the class members, during the pendency of their applications for asylum, without any possibility of parole. The complaint filed on June 16, 1981 contained seven counts, four of which were dismissed by the district court on February 24, 1982.[1] Three issues remained for trial: (1) whether the

[1] In the counts dismissed by the district court, the plaintiffs claimed that (1) the defendants (INS officials and the attorney general) had compelled the plaintiffs to appear at preliminary interviews in which the plaintiffs were not advised of their right to counsel nor permitted to be accompanied by counsel, all in violation of the Administrative Procedure Act, 5 U.S.C. § 555(b); (2) the failure of the defendants to notify class members of procedural rights attendant to their exclusions hearings violated INS's own regulations, the Immigration and Nationality Act (INA), 8 U.S.C. § 1362, and the Fifth Amendment's Due Process Clause; (3) pursuant to INS regulations, the class members were entitled to individualized, public exclusion hearing; and (4) the defendants were denying the plaintiffs the right to apply for political asylum, in violation of the Due Process Clause, INA § 1158, and INS regulations.

defendants' departure from the established policy of paroling undocumented aliens, without formal rulemaking, violated the Administrative Procedure Act (APA), 5 U.S.C. § 553; (2) whether the unique manner in which Haitian refugees were treated violated their right to equal protection under the Fifth Amendment, since it amounted to a classification based on race and national origin; and (3) whether the class members were unlawfully denied their Fifth Amendment rights of access to legal counsel, relatives, and friends in the Miami community.

After a six-week trial, the district court ruled that INS had violated the APA by failing to engage in formal rulemaking before revising its policy of paroling applicants for asylum. *Jean I*, 544 F.Supp. at 993-97, 1003-04. Ten days later, the court declared by separate order that the detention policy was void, and ordered the release of the plaintiff class pursuant to a plan detailed in the order. *Louis v. Nelson*, 544 F.Supp. 1004, 1006-09 (S.D.Fla. 1982). The court also ruled that there was insufficient evidence to support the plaintiffs' equal protection claim. *Jean I*, 544 F.Supp. at 997-1002, 1004. The court declined to rule on the access claim, "ostensibly because the issue was mooted by the release order." *Jean II*, 711 F.2d at 1464.

A panel of this court affirmed the district court's APA ruling, concluding that the policy of detaining undocumented Haitian refugees constituted a new "rule" that had

been formulated without following APA rulemaking procedures. *Id.* at 1474-83. The panel reversed the district court's holding that the plaintiffs had failed to make out a case of intentional discrimination. *Id.* at 1483-1502. The panel also reached the merits of the claim, dismissed by the district court, that the class members had been denied a right to receive notification that they were entitled to apply for asylum. *Id.* at 1507-08. Finally, the panel acknowledged that the plaintiffs' access claim was not moot because of the possibility that INS would revoke class members' parole; it ordered a remand to determine whether the government's access restrictions were unlawful. *Id.* at 1508-09.

Sitting in banc,[2] this court held that the APA claim as originally presented to the district court had become moot because the class members were no longer subject to detention, unless such detention was pursuant to new regulations promulgated by INS subsequent to the district court's decision in *Jean I*. These regulations, *see* 8 C.F.R. § 212.5, require INS to make parole determinations without regard to an alien's race or natural origin; thus, we dismissed the appeal as to the APA claim. *Jean III*, 727 F.2d at 962.[3] As for the equal protection claim, the court

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[2] Pursuant to our rules, the granting of rehearing in banc vacated the panel opinion. 11th Cir.R. 35-11. The in banc court, however, adopted the panel and district court statements of the facts. *See Jean III*, 727 F.2d at 962.

[3] Because the government is no longer detaining any class members except pursuant to the new regulations, the APA issue as originally presented had been rendered moot. The validity of these new regulations is not before this court, and we express no opinion in this regard. We accordingly dismiss the appeal as to [the APA claim] and remand with instructions that this part of the district court's judgment be vacated.

Jean III, 727 F.2d at 962.

held that excludable aliens have no equal protection rights with regard to the processing of their asylum or admission applications or INS determinations that they should not be paroled. The claim was nonetheless remanded to determine whether low-level INS officials were discriminating against plaintiffs in violation of instructions from their superiors. *Id.* at 967-79. The court also held that the Refugee Act of 1980 does not create a constitutionally protectable interest in receiving notice of the right to petition for asylum. *Id.* at 979-80. Finally, the court held that the access claim was not moot and remanded it to the district court for full consideration.

In *Jean IV*, the Supreme Court affirmed the judment of our in banc court, but explained that we should not have reached the merits of the constitutional question. In arguing the case before the Court, the Solicitor General conceded that because the statute granting parole authority to the attorney general, 8 U.S.C. § 1182(d)(5)(A), and 8 C.F.R. § 212.5, did not include race or natural origin as factors relevant to a parole determination, INS was prohibited from considering these factors.[4] In light of the

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[4] Respondents [the government defendants] concede that the INS parole discretion under the statute and these regulations, while exceedingly broad, does not extend to considerations of race or national origin. Respondent's position can best be seen in this colloquy from oral argument:

> "Question: You are arguing that constitutionally you would not be inhibited from discriminating against these people on whatever ground seems appropriate. But as I understand your regulations, you are also maintaining that the regulations do not constitute any kind of discrimination against these people, and . . . your agents in the fields are inhibited by your own regulations from doing what you say the Constitution would permit you to do."
> "Solicitor General: That's correct."

Jean IV, 105 S.Ct. at 2997 (quoting transcript of oral argument before the Supreme Court).

neutral quality of the criteria contained in the new regulation, the Court affirmed our in banc court's judgment "insofar as it remanded to the District Court for a determination whether the INS officials are observing this limit upon their broad statutory discretion to deny parole to class members in detention." *Jean IV*, 105 S.Ct. at 2998. The question to be resolved on remand was whether INS was properly following the statutory and regulatory framework in making parole determinations. *Id.*

B. *Attorney's Fee Litigation*

The Supreme Court has admonished the courts to ensure that a request for attorney's fees does "not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). Contests over EAJA fees and expenses do not typically threaten to upset this ideal.[5] Yet a case of this magnitude and complexity, in which approximately 45 lawyers have periodically participated,[6] can be expected to place substantial pressure on the norm. After a hearing consuming five days, and a review by the district court of "hundreds of pages of affidavits," the court awarded $950,944.87 in attorney's fees to seven individual attorneys and one law

[5] The overwhelming majority of EAJA awards in fiscal year 1986-87 were against the Department of Health and Human Services (351 of 387 awards). The average award was $2,379. *Pierce v. Underwood*, ___ U.S. ___, 108 S.Ct. 2541, 2549, 101 L.Ed.2d 490 (1988) (citing Annual Report of the Director of the Administrative Office of the U.S. Courts, Fees and Expenses Awarded Under the Equal Access to Justice Act pp. 99-100, Table 29 (1987)).

[6] "The government had, at one time or another, thirty different attorneys working on the case. Naturally, the Plaintiffs had to respond in kind with their own forces, although, the Court notes that Plaintiffs had approximately one half the number of counsel." *Louis v. Nelson*, 646 F.Supp. 1300, 1308-09 (S.D.Fla.1986).

firm, $152,169.33 in costs and expenses to two individual attorneys, one firm and the Haitian Refugee Center. It also awarded fees, expenses and costs for the attorney's fee litigation itself.

The district court's rulings and award are contained in two deliberate and detailed orders, the first assessing the plaintiff's entitled to fees, the second explaining the court's calculations.[7] Because the government has contested virtually every aspect of the district court's legal rulings and calculations, and because there is merit to some of the government's contentions, we will closely analyze the components of these orders.

II. QUALIFYING FOR EAJA FEES

The EAJA provides that

> a court shall award to a prevailing party . . . fees and other expenses, . . . incurred by that party in any civil action, . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). As the district court noted, there are three predicate findings to an award of EAJA fees and expenses: (1) the litigant opposing the United States must be a "prevailing party"; (2) the government's position must not have been substantially justified; and (3) there must be no circumstances that make an award

[7] The court's order entitled "Corrected Memorandum Opinion and Order on Attorney's Fees, Costs, and Expenses" appears at 646 F.Supp. 1300 (S.D.Fla.1986). This opinion details the manner in which the award was calculated. An earlier order discussing the plaintiffs' entitlement to fees and costs appears as an appendix to this memorandum opinion. *See id.* at 1323-38.

against the government unjust. 646 F.Supp. at 1324. Only the first two of these issues concern us because the United States does not maintain that there are special circumstances that make the EAJA award unjust.

A. *Are the Plaintiffs Prevailing Parties?*

Our circuit employs the same test to determine whether an applicant for EAJA fees is a "prevailing party" as we use to resolve "prevailing party" eligibility for attorney's fees under 42 U.S.C. § 1988:

> The prevailing party test is "whether he or she has received substantially the relief requested *or* has been successful on the central issue," *Watkins v. Mobile Housing Board*, 632 F.2d 565, 567 (5th Cir. Unit B 1980), *or*, stated another way, whether "plaintiffs' lawsuit was a catalyst motivating defendants to provide the primary relief sought in a manner desired by litigation." *Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir.1981).

Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir.1985) (in banc) (emphasis added).[8]

The United States contends that the plaintiffs did not prevail under this standard. The government's position appears to be that the "real" issue in this case was the equal protection claim, on which the plaintiffs failed to secure relief. The government considers the APA claim, on which the plaintiffs unquestionably prevailed before the district court, to be insufficient to support an attorney's fee award since we later held it was moot, and ordered that the resulting injunctive relief be vacated. There are two responses to the government's position.[9]

[8] For an indication in the EAJA's legislative history that Congress intended to give the term prevailing party the same meaning it has in other fee-shifting statutes, see H.R.Rep. 1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Admin.News 4984, 4990.

First, it is well established that a party need not obtain relief on every claim or legal theory it propounds in order to be considered "prevailing" under a fee-shifting statute. In the context of the Civil Rights Attorney's Fees Act (42 U.S.C. § 1988) (section 1988), the Supreme Court has made clear that a plaintiff is "prevailing' if he proves "his entitlement to *some* relief on the *merits* of his claims, either in the trial court or on appeal." *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670 (1980) (per curiam) (emphasis added). He or she need not prevail on all legal issues. *Id.* Our court has applied these standards in the EAJA context. *See Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1495-96 (11th Cir.) (interim EAJA award where plaintifs prevailed on a central issue), *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir.1986); *Ray v. Florida Cabinet*, 845 F.2d 311, 313 (11th Cir.1988).

Second, our in banc court has held that the mooting of a lawsuit by a defendant's favorable remedial action does not necessarily deprive a plaintiff of "prevailing party" status. *Martin*, 773 F.2d at 1149 (citing *Fields v. City of*

[9] At oral argument, counsel for the United States conceded that the plaintiffs were prevailing parties with regard to the APA claim. We elaborate on the meaning of the term "prevailing party" to explain why prevailing on this issue was sufficient to make the plaintiffs prevailing parties with regard to the entire lawsuit.

> The government also points to the most recent decision in this action, *Jean v. Nelson*, 854 F.2d 405 (11th Cir.1988), as support for its argument that the plaintiffs did not "prevail." In this opinion we instruct the district court to vacate all remaining injunctive relief in favor of the plaintiffs in accordance with our previous *in banc* decision. This new decision adds nothing to the posture of this case.

Tarpon Springs, 721 F.2d 318, 321 (11th Cir.1983) (per curiam)); *Doe v. Busbee*, 684 F.2d 1375, 1379 (11th Cir.1982)). As we said in *Doe*, "a party may be considered to be 'prevailing' if the litigation successfully terminated by . . . [a] mooting of the case where the plaintiff has vindicated his right." 684 F.2d at 1379, *quoted in Martin*, 773 F.2d at 1149. We often describe this class of cases as "catalysts." In these cases, "parties are prevailing if 'their lawsuit was a significant catalytic factor in achieving the primary relief sought through litigation despite failure to obtain formal judicial relief[,]' or 'if their lawsuit is a substantial factor or a significant catalyst in motivating the defendants to end their [unlawful] behavior.' " *Doe*, 684 F.2d at 1380 (citations omitted).

We do not regard the mooting of the plaintiffs' APA claim as extinguishing their legal victory for purposes of attorney's fees. As the district court noted, the plaintiffs' objectives were (1) "to stop the mass exclusion hearings which were being held without counsel" and (2) "to obtain the release from detention of class members pending the determination of their political asylum applications." 646 F.Supp. at 1305.

As to the first of these objectives, the district court explained that

> shortly after this case was filed the government conceded that the exclusion orders entered at such hearing were invalid and therefore said orders were vacated.

646 F.Supp. at 1324 n. 2. Under these circumstances, the district court could properly conclude that the plaintiffs "were the prevailing party on this aspect of the case." *Id.*

As to the second of these objectives, it is undisputed that the plaintiffs' lawsuit secured their release; some were returned to detention but only after INS promulgated new

regulations. This is apparent from our in banc court's discussion of the mootness issue:

> After the district court rendered its decision, the government promulgated new regulations in accordance with the APA. *See* 8 C.F.R. § 212.5 (1982). At oral argument before this court counsel for petitioners stated that one hundred or more class members are currently being held in detention, but these detainees either had their parole revoked . . . , or arrived in this country after the government's promulgation of its new regulations. *Because the government is no longer detaining any class members except pursuant to the new regulations, the APA issue as originally presented has been rendered moot.*

727 F.2d at 962 (emphasis added). Thus, the claim became moot because the plaintiffs had been released from detention and could not again be detained unless pursuant to duly promulgated regulations regarding parole. Under these circumstances, the district court was authorized to conclude that the plaintiffs were EAJA prevailing parties.

B. *Was the Position of the United States Substantially Justified?*

In *Pierce*, the Supreme Court held that appellate review of the question whether the United States' position is "substantially justified," is subject to an abuse of discretion standard. 108 S.Ct. at 2546-49; *see also Haitian Refugee Center*, 791 F.2d at 1496; *National Treasury Employees' Union v. IRS*, 735 F.2d 1277, 1278 (11th Cir.1984); *White v. United States*, 740 F.2d 836, 839 (11th Cir.1984); *Ashburn v. United States*, 740 F.2d 843, 846 (11th Cir.1984).

As the Court explained, this question is one which the district courts are " 'better positioned' " to decide. 108 S.Ct. at 2547 (citation omitted).

> To begin with, some of the elements that bears upon whether the Government's position "*was* substantially

justified" may be known only to the district court. Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government. Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the fact-finder below, but to determine whether urging of the opposite merits determination was substantially justified.

Id.

The second standard established by the Court in *Pierce* is the meaning of the term "substantially justified." The Court agreed that the standard of "reasonableness" adopted by the overwhelming majority of circuit courts was the proper one. Thus, to be substantially justified, the United States' position must have a "reasonable basis both in law and fact." 108 S.Ct. at 2550 (citing *Ashburn*, 740 F.2d at 850) (other citations omitted). *See also United States v. Certain Real Estate Property*, 838 F.2d 1558, 1561 (11th Cir.1988); *Stratton v. Bowen*, 827 F.2d 1447, 1449 (11th Cir.1987); *Haitian Refugee Center*, 791 F.2d at 1497.[10]

[10] In an alternative formulation, the Court said that "reasonably justified" also means " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." 108 S.Ct. at 2550. The Court rejected the suggestion, made without elaboration by this court, that the test for reasonableness under the EAJA "is more than mere reasonableness." *Id.* at 2550-51. *See Haitian Refugee Center*, 791 F.2d at 1497; *Stratton*, 827 F.2d at 1449 & n. 3; *Certain Real Estate*, 838 F.2d at 1561 n. 6.

The *Pierce* court did not fix any precise guidelines for assessing a district court's discretionary review of the reasonableness of the government's position. Factors considered, but held not individually dispositive on the facts in *Pierce*, included: (1) the state at which the ligation was resolved; (2) views expressed by other courts on the merits; and (3) the legal merits of the government's position. 108 S.Ct. at 2551-53. Following the D.C. Circuit, our court has also suggested that the following additional factors assist in the reasonableness inquiry: (1) the clarity of the governing law; (2) the foreseeable length and complexity of the litigation; and (3) the consistency of the government's position. *Haitian Refugee Center*, 791 F.2d at 1497 (citing *Spencer v. NLRB*, 712 F.2d 539, 559-60 (D.C.Cir.1983)). Of course, these guideposts are not intended to be an exhaustive list of all the factors a district court, acting in its discretion, may undertake to review. *Id.*

In disputing the district court's conclusion on the question of substantial justification, the government argues that the district court simply erred with respect to the APA in *Jean I*. Because the questions of law were at least "unsettled," the government contends that it was substantially justified.[11] The government is asking, in essence,

[11] The government's posture is succinctly stated in its brief: "The government presented [to the district court] compelling, and in our view, correct arguments that its change in parole practice either did not amount to a 'rule' within the meaning of the APA, or . . that it fell within three exceptions to the APA 'notice and comment' procedure requirements." Brief for the United States at 25.

that we reweigh the merits of its defense on the APA claim. Two things counsel against such a course. First, this would put us in the position of assessing legal questions that are not before us on the merits. The Supreme Court has explained that under circumstances such as this, an abstract discussion of the law is unwise. Where circuit law is unsettled,

> A ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has changed since) effectively establish the circuit law in a most peculiar, second-handed fashion.

Pierce, 108 S.Ct. at 2548. Certain cases will require an appellate court to review the content of the government's legal arguments to determine whether it was substantially justified. *Pierce* was such a case because it focused purely on questions of law. Under these circumstances, it would be useful to examine, for example, the weight of authority on the contested questions; in *Pierce,* the Court conducted such a review. As we will demonstrate, such a review is not necessary in this case.

The second and more important reason for not reopening the merits in this case is that there are sufficient legal and factual indicia upon which the district court relied to support the district court's conclusion that the government's position was not substantially justified.

First, the district court placed particular emphasis on a memorandum that acting General Counsel for INS prepared for the service in early 1981. The memorandum summarized the legal requirements applicable to the defendants' detention policy and mass exclusion hearings. It explained that " '[a]ny change in regulation which takes rights or privileges away from aliens will most likely require a 60-day notice and comment period, and a 30-day

delayed effective date. . . .' " 646 F.Supp. at 1326. The district court viewed the defendants' failure to follow this advice as knowing and willful. The court quoted its own review of the evidence on this point in the opinion on the merits:

> "[The defendants] admitted to the Court that they made a conscious effort not to promulgate a rule pursuant to the [APA]. The evidence shows that they never seriously undertook the difficult task of drafting a set of guidelines concerning which aliens would be placed in detention. Instead, INS issued general instructions to its field officers to start detaining excludable aliens. . . ."

646 F.Supp. at 1326 (citation omitted).

In light of the fact that two district judges in the Southern District of Florida had held that APA procedures applied to changes in INS policy toward Haitian refugees, *Sannon* v. *United States,* 460 F.Supp. 458, 466-67 (S.D.Fla.1978), *remanded to be vacated as moot,* 631 F.2d 1247 (5th Cir.1980); *National Council of Churches v. Egan,* No. 79-2959-Civ-HOEVELER (S.D. Fla. Aug. 3, 1979), the district court concluded that the government's position was unreasonable.

We agree with the government that these two cases, standing alone, would not be dispositive of the reasonableness of its position. Sometimes legal authority against the government on a given legal position will build to such a point that it will be difficult to maintain that the government's continued adherence to that position is reasonable. It will seldom be the case, however, that two district court decisions—even if they appear in the same district in which the relevant case is being litigated—will raise such an obstacle. The government must be permitted to make some strategic choices. It must have the oppor-

tunity to make good faith challenges to legal authority with which it reasonably disagrees.

The problem for the government in this case is that INS's acting General Counsel cited one of these district court decisions in forming his opinion that APA procedures were to be followed before INS could substantially alter its detention and parole policies. *Cf. Sannon,* 460 F.Supp. at 466. While the *existence* of this decision is not dispositive, the acting General Counsel's reliance on it is highly significant. The important fact for the district court was that the defendants willfully ignored the advice of counsel. The government's only real response to this point is that the memorandum authored by INS's counsel refers to "regulations," and, impliedly, not to rules. Reply Brief for the United States at 9 n. 8. Of course, the district court held that INS change in policy was a "substantive *rule*" subject to APA rulemaking requirements. 544 F.Supp. at 997. If the government is suggesting that it did not ignore the advice of counsel because the memorandum refers to "regulations" and not "rules," this argument is patently frivolous. *See, e.g.,* K.C. Davis, *Administrative Law Text* § 5.01 at 123 (3d ed. 1972) ("regulation [is] a term used interchangeably with rule").

We conclude that the district court could properly consider the defendants' failure to follow the advice of counsel unreasonable. *Cf. Hudson v. Secretary of Health and Human Services,* 839 F.2d 1453, 1456-57 (11th Cir.1988) (reversing district court finding of substantial justification where agency secretary failed to follow agency regulation).

The district court also explained that the government behaved unreasonably in repeatedly denying—early in the lawsuit—that it had developed any new policy toward Haitians. It claimed instead that "district directors still had complete discretionary authority to parole individuals or,

alternatively, that the district directors were merely enforcing the statute." 646 F.Supp. at 1326. According to the district court,

> It was only well into the litigation that the defendants admitted what had been obvious—that there was a detention policy and that they had instituted this policy without complying with rulemaking procedures. Since that plaintiffs had consistently maintained that there was a detention policy, the defendants' unreasonable factual position unnecessarily prolonged the litigation of this matter.

Id. Although the government challenges this finding, we conclude that it is supported in the record. The parties' joint pretrial stipulation lists as a *factual* issue for trial the question whether "defendants changed their policy of regularly releasing Haitians to a policy of detention without parole." Given the district court's unique familiarity with the historical consistency of the government's factual position, we conclude that it did not abuse its discretion in finding that the government unreasonably protracted the litigation by failing to acknowledge a change in its parole policy. *See Haitian Refugee Center,* 791 F.2d at 1497.

III. AMOUNT OF THE AWARD

Although we have concluded that the district court acted within its discretion in making an EAJA award, there remains the question whether the amount of the award was proper. With regard to attorney's fees, the government challenges both the number of reimbursable hours and the hourly rates used by the district court in making its award. The government also challenges the award of costs and expenses, and the award of "fees for fees." In reviewing the district court's calculations, we are

again bound to apply an abuse-of-discretion standard. *Pierce*, 108 S.Ct. at 2553 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983); *Cf. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560-61, 106 S.Ct. 3088, 3096, 92 L.Ed.2d 439 (1986)).

A. ***Reimbursable Hours***

The plaintiffs' attorney prepared documents indicating that they had spent 11,261.95 reimbursable hours working on this lawsuit. In accordance with earlier guidance given by the district court, the attorneys subtracted a certain number of hours (467.4) from the total for work done on the equal protection claim and reduced by sixty percent the number of hours attributable to their work on the case before the Supreme Court (resulting in a further reduction of 1,604.31 hours). This left a total of 9,190.24 hours for which the attorneys sought compensation. The district court concluded that the reduction of hours for equal protection work was too low and reduced the total hour figure by an additional fifteen percent. It also concluded that the attorneys could be compensated for only twenty-five percent of the hours spent "at the Supreme Court level." 646 F.Supp. at 1315. This left a total 5,756.84 hours the district court found to be reimbursable. The government has attacked this figure on several grounds.

1. Supreme Court Litigation

The district court awarded compensation for twenty-five percent of the hours spent litigating the case before the Supreme Court. The only issue before that Court was the merits of the plaintiffs' equal protection claim which was rejected by this court sitting in banc. The Supreme Court *affirmed* our in banc court's judgment, but held

that we should not have reached the merits of the constitutional issue. Normally, a prevailing party is entitled to attorney's fees for work done on appeal. *See. e.g., Hutto v. Finney*, 437 U.S. 678, 693-700, 98 S.Ct. 2565, 2574-78, 57 L.Ed.2d 522 (1978) (section 1988); *O'Donnel v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1553 (11th Cir. 1984) (attorney's fees under Fair Labor Standards Act). But that party must also *prevail on appeal* to qualify for appellate attorney's fees. *See. e.g., Bonner v. Coughlin*, 657 F.2d 931, 935-36 (7th Cir. 1981) (section 1988). On its face, the Supreme Court's judgment provides no basis for an award of EAJA fees because there is no question that the plaintiffs did *not* prevail in the Supreme Court.

The district court, however, found that the plaintiffs were entitled to fees for their appeal to the Supreme Court because the government had changed its legal position in that court. According to the district court, the government acknowledged for the first time, in the Supreme Court, that INS regulations prohibited it from using nationality as a factor in making parole decisions. The district court found that "if the government had argued at the District Court and Eleventh Circuit levels the position it took in the Supreme Court, the constitutional claims would not have needed to be litigated." 646 F.Supp. at 1314. This, the district court concluded, provided a basis for EAJA fees for the work performed before the Supreme Court. Assuming the accuracy of the district court's finding regarding a change in the government's position, we nonetheless conclude that the plaintiffs are not entitled to attorney's fees for the Supreme Court litigation. The plaintiffs were seeking a declaration by the Supreme Court that the Constitution prohibits INS from considering race and national origin in making parole decisions. The Court did not reach the question because of the government's concession that 8 C.F.R. § 212.5 is facially a neutral regulation.

Even though the Court found that our in banc court should not have reached the constitutional issue, it did not vacate our opinion; instead, it affirmed our remand to the district court.

The plaintiffs argue that even though the Supreme Court affirmed our in banc court's judgment, they were in fact victorious because the result was a judicial declaration that INS could not discriminate in making parole decisions. We reject this argument for the simple reason that the plaintiffs did not prevail on any legal issue or obtain any additional relief subsequent to our in banc court's decision. We therefore conclude that the district court abused its discretion in compensating them for a portion of the expense of litigating the case at that level. *Cf. Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897, 920 (3d Cir.1985) (ordering disallowance of all hours spent litigating case "after the date on which plaintiffs received their last benefit from the defendants"); *Clark v. City of Los Angeles,* 803 F.2d 987, 993 (9th Cir.1986) (no attorney's fees for appellate work when "nothing associated with the appeal contributed to [the] favorable result achieved by litigation'. On remand, in recalculating the EAJA award, the district court shall exclude any hours spent on Supreme Court litigation.

2. Unsuccessful Claims

In *Hensley v. Eckerhart,* the Supreme Court held that an award of attorney's fees should be commensurate with the degree of a prevailing party's success. The principles adduced in *Hensley* are generally applicable here:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved."
> . . .
>
> * * * * *
>
> In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff had obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.
>
> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious

counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

• • • • •

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

461 U.S. at 434-37, 103 S.Ct. at 1940-41 (footnotes and citations omitted).

Having reviewed the district court's approach to evaluating the degree of the plaintiff's success, we conclude that it acted within its discretion and followed generally the Supreme Court's guidance in *Hensley*. It first directed counsel to excise from its fee request those hours spent litigating the equal protection issue. After finding counsel's estimates of the time spent exclusively on this issue "too low," the district court explained its calculation as follows:

> By the Court's estimate, forty percent (40%) of counsel's time was spent on clearly non-equal protection matters. Perhaps sixty percent (60%) . . . was spent on interrelated matters; an insignificant portion of that time was spent on exclusively on equal protection issues. Of the 60% spent on commingled material, the Court estimates that approximately 25% of that time was spent on equal protection issues. Thus, a reduction, of 15% from the total number of hours is in order.

646 F.Supp. at 1315. Here, the "trial court correctly recognized that the fee award should exclude the time

spent on [the] unsuccessful claim[] except to the extent that such time overlapped with related successful claims." *Trezevant v. City of Tampa*, 741 F.2d 336, 341 (11th Cir.1984).

The government argues that further reductions were in order because the factual overlap between the APA and equal protection claims were less substantial than the district court found. The government has provided us with no basis, however, to discern the degree to which it believes the district court abused its discretion. In contrast, the plaintiffs have supplied us with numerous citations to the record from the attorney's fees proceedings which indicate that the district court had adequate information to support a finding that the legal and factual issues did overlap substantially. The government would also have us order a reduction of the total hour figure on the ground that the plaintiffs obtained "limited" success. As we explained above, we do not think this case is one in which the victory secured was merely technical or formalistic. The plaintiffs obtained the relief they sought in their lawsuit, although not in the form of a declaration that the government had violated the Constitution. If the hours spent litigating the constitutional issues were properly deducted by the district court, there is no reason to further reduce the award.

3. Documentation and Duplication of Effort

Given the detailed record in the fee proceedings, we also reject the government's contention that the attorney's fees requests were not supported by sufficient documentation. The government's principal complaint in this regard is that several of the fee applications were in part the product of "reconstructed" time records. Recently, a number of courts have announced *prospective* rules requiring the filing of contemporaneous records to support an application

of attorney's fees. *See Grendel's Den, Inc. v Larkin,* 749 F.2d 945, 952 (1st Cir.1984); *Ramos v. Lamm,* 713 F.2d 546, 553 (10th Cir.1983); *New York State Association for Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1147 (2d Cir.1983). Our court, however, has held that contemporaneous time records are not indispensable where there is other reliable evidence to support a claim for attorney's fees. *Johnson v. University College,* 706 F.2d 1205, 1207 (11th Cir.), *cert. denied,* 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983); *see also Dennis v. Warren,* 779 F.2d 245, 249 (5th Cir.1985); *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465, 1473 (9th Cir.1983). The government has pointed to no particular fee record considered by the district court which was so unreliable as to require that the district court reject it as a basis for part of the award. We find nothing to indicate that the district court abused its discretion in relying in part on reconstructed time records.

We likewise reject the government's contention that counsels' hours were subject to reduction as a result of unnecessary duplication of their efforts. The government asserts that lead counsel in Miami failed to oversee and coordinate the work performed by New York co-counsel and that this resulted in unnecessary duplication of attorney effort. The district court carefully considered the question of undue duplication and found credible counsels' representations that they had "purged" their time sheets of unnecessary duplication. 646 F.Supp. at 1314. Our court has recognized that the retention of multiple counsel in complex cases is "understandable and not a ground for reducing the hours claimed" because "[t]he use in involved litigation of a team of attorneys who divide up the work is common for both plaintiff and defense work." While duplication of effort is a proper ground for reducing a fee award, "a reduction is warranted only if the attorneys are *unreasonably* doing the *same* work." *Johnson,* 706 F.2d at 1208. Again, the government has pointed to no specific instances in which counsels' work was unreasonably duplicative. We find that the district court did not abuse its discretion in this regard.

B. ***Hourly Rates***

In arriving at its attorney's fee figures, the district court began by considering the factors enumerated by this court in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir.1974). The *Johnson* factors, first developed in the Title VII context, constitute one widely accepted mechanism for ,calculating attorney's fees. Because many of the *Johnson* factors are subsumed into the initial calculation of an attorney's fees lodestar (reimbursable hour multiplied by hourly rate), the Supreme Court has expressed some criticism of the *Johnson* approach in dicta. *See Hensley v. Eckerhart,* 461 U.S. at 435 n. 9, 103 S.Ct at 1940 n. 9. Nonetheless, this court has held that the factors enumerated in *Johnson* are to be considered in calculating EAJA fees. *See Florida Suncoast Villas, Inc. v. United States,* 776 F.2d 974, 975 (11th Cir.1985) (*Johnson* factors play a role in arriving at reasonable EAJA fee).

The Supreme Court's *Pierce* opinion has led us to reappraise this approach, and focus instead on the language of the Act. The EAJA provides that "fees awarded . . . shall be based upon prevailing market rates for the kind and quality of the services furnished," but "shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the pro-

ceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). As the statute indicates, a court's starting point should be not the *Johnson* factors but the "prevailing market rates" for services of like quality and kind. Market rates for legal services being what they are, these rates will exceed the EAJA's $75 cap in many cases. But this fact alone does not authorize a court to make an upward adjustment in hourly rates. As the Court explained in *Pierce,* the EAJA's special factor formulation "suggests Congress thought that $75 was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be." 108 S.Ct. at 2554.

On remand, the district court must first determine the prevailing market rates for services of the kind and quality provided. This inquiry will typically focus on affidavits or testimony of similarly situated practitioners, who are uniquely qualified to express opinions as to "what the market will bear." The fee requests in this case ranged from $40 per hour for paralegal time to $175 per hour for experienced counsel. If these requests accurately reflect prevailing market rates, the district court must still find that a cost of living increase or a "special factor" justifies hourly rates of more than $75 before it can award fees at a rate in excess of this figure. *See, e.g., Hyatt v. Heckler,* 807 F.2d 376, 382-83 (4th Cir.1986) (although expert testimony proved that prevailing market rate was $125, district court properly reduced rate to $75), *cert. denied,* ___ U.S. ___, 108 S.Ct. 79, 98 L.Ed.2d 41 (1987).

1. Cost of Living

In its EAJA award, the district court cited the statutory cost of living increase permitted by the EAJA as a ground for upward adjustment. The court failed, however, to specify in dollar amounts the impact of this factor in

reaching its overall award. A case of this duration and complexity will make it difficult to make cost of living adjustments with absolute precision. Nonetheless, a court should describe mathematically the basis of all cost of living adjustments under the Act. On remand, the district court shall quantify and explain all cost of living adjustments in favor of each of the plaintiffs' attorneys.

We consider one more question regarding cost of living adjustments. The 1985 enactment of the EAJA contains the same $75 hourly figure found in the original, 1980 version of the Act. Recently, a question has arisen as to whether Congress intended to "restart the clock" on cost of living adjustments by retaining the $75 cap. One circuit court has so held. *See Chipman v. Secretary of Health & Human Services,* 781 F.2d 545, 547 (6th Cir. 1986) (given retention of $75 figure, court does not abuse discretion in failing to make adjustment for pre-1985 services). The government has urged us to adopt this position and hold that no cost of living adjustment can be made for legal services performed prior to the effective date of the 1985 version of the Act. Instead, we join the growing number of circuit courts which have held that the EAJA's 1985 reenactment does not bar cost of living adjustments for services rendered prior to 1985. *See Trichilo v. Secretary of Health & Human Services,* 823 F.2d 702, 706-07 (2d Cir.1987); *Allen v. Bowen,* 821 F.2d 963, 967 (3d Cir.1987); *Sierra Club v. Secretary of the Army,* 820 F.2d 513, 520-23 (1st Cir.1987); *Hirschey v. FERC,* 777 F.2d 1, 5 (D.C.Cir.1985).

2. Special Factors

The district court adjusted the hourly rates of plaintiffs' counsel on the basis of the only "special factor" named in the EAJA, "the limited availability of qualified counsel."

In *Pierce,* the Supreme Court gave this phrase a rather limited construction in light of the EAJA's $75 cap. The Court explained that

> "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys "qualified for the proceedings" in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having *some distinctive knowledge or specialized skill* needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are *necessary* and can be obtained only at rates in excess of the $75 cap, reimbursement above that limit is allowed.

108 S.Ct. at 2554 (emphasis added). The Court's view is clear: a mere short supply of qualified lawyers willing to take a case for $75 per hour or less does not mean that there is a "limited availability of qualified counsel."

In addition, where highly skilled lawyers or lawyers with the best reputations participate, this is not a factor to be considered once it is established that market rates for their services exceed $75. Under such circumstances only a special skill authorizes an upward adjustment of hourly rates. From the district court's order, we perceive only two grounds for which a rate adjustment might be proper on the basis of special factors. First, some of the participating attorneys have a special expertise in immigration law. This is narrow legal specialty which might entitle them to an adjustment if market rates for their services exceed $75. *Cf. Hoopa Valley Tribe v. Watt,* 569 F.Supp. 943, 947 (N.D.Cal.1983) (increased hourly rates for expert in native

American law). Second, at least one of the plaintiffs' attorneys is fluent in French and Haitian Creole. According to the district court "her language abilities were crucial to her work in communicating with and preparing the testimony of Haitian plaintiffs and witnesses." 646 F.Supp at 1312. If prevailing market rates for her services exceed $75—something which is not readily apparent since her initial fee request was based on a $75 per hour rate—she might be entitled to an increased hourly rate. On remand, the court shall consider whether either of these factors are "special" for EAJA purpose and entitle the relevant attorneys to increased hourly rates.[12]

3. "Enhancement"

The district court enhanced the overall fee award of each attorney for the plaintiffs who was awarded fees. The court assumed that the limited circumstances in which the Supreme Court has authorized lodestar adjustments applied to EAJA cases. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council,* 478 U.S. 546, 106 S.Ct. 3088, 92

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[12] The dissent contends that attorneys practicing immigration law do not have any "distinctive knowledge or specialized skill *needful for the litigation in question*" within the meaning of that phrase as it is used in *Pierce,* 108 S.Ct. at 2554 (emphasis added). The majority agrees that not every immigration attorney or every immigration lawsuit warrants an upward adjustment of hourly rates and we would suggest that such is also the case in some patent or foreign law cases. Lawyers and judges could spend the balance of time arguing about the meaning and scope of the above-quoted phrase from *Pierce.* Interpretation of this phrase is better left to the discretion of the district court as application of the phrase will necessarily depend on the complexity of the case ("the litigation in question") and on the experience ("distinctive knowledge") and acquired expertise ("specialized skill") of the particular billing attorney. We are confident that the district court can properly interpret and apply the above-quoted phrase to the facts of this case.

L.Ed.2d 439 (1986) (modification proper only in rare and exceptional cases) (citing *Blum v. Stenson*, 465 U.S. 886, 889, 104 S.Ct. 1541, 1549, 79 L.Ed.2d 891 (1984)). In light of the Court's second *Delaware Valley Citizens' Council* decision, ____ U.S. ____, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987), decided after the district court made its award, the legal status of all enhancements and multipliers in cases concerning fee-shifting statutes is unclear. One thing, however, is certain. Given that the EAJA constitutes a partial waiver of the United States' immunity, the Act must be strictly construed. If the award made by a court is to be based on rates in excess of the figure provided by the Act, it must be because the Act permits it. *Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 2963, 92 L.Ed.2d 250 (1986) (waiver must be construed strictly in favor of sovereign and not enlarged beyond what the language requires). Under the statute, only special factor adjustments and cost of living adjustments are authorized. Blanket enhancements are not authorized. Nonetheless, we will consider whether the factors relied upon in enhancing the overall fee awards can qualify as special factors within the meaning of the EAJA.

a. *Pro Bono Publico*

The district court held that because the plaintiffs' attorneys were motivated by concern for the plight of Haitian refugees and not pecuniary self-interest, they were entitled to an increased award. Plaintiffs' counsel are to be lauded for their efforts on behalf of the indigent and those they believed were wrongfully oppressed. But the EAJA does not distinguish between the selfless lawyer and the selfish one. We hold that neither the personal motivations of attorneys acting *pro bono publico*, nor the *pro bono* nature of a case, presents an EAJA "special factor." *Cf.*

Pierce, 108 S.Ct. at 2554 (both contingent fee arrangement and undesirability of a case are too broad and general for either to be considered a "special factor").

b. *Vindication of Public Rights*

The district court enhanced the fee awards because counsel had acted as "private attorney generals seeking to vindicate public rights." 646 F.Supp. at 1317-18. While we agree that such actions are to be commended, for the reasons just discussed, this consideration cannot support a award exceeding the statutory cap. In many cases where EAJA fees may be awarded, the party opposing the government seeks to force compliance with federal law. In a narrow sense, these cases will always involve a vindication of "public" rather than purely "private" rights.

Permitting adjustments of hourly rates on this ground would therefore contravene the Supreme Court's view that "special factors" must not be "of broad and general application." *See* 108 S.Ct. at 2554.

c. *The Emotional Hardship to Plaintiffs' Counsel*

The district court acknowledged, and we do not dispute, that this case imposed unique pressures on counsel for the plaintiffs. Trial evidence established that many of the plaintiffs sustained severe psychological problems as a result of their prolonged detention. Family members were isolated. Some members of the class committed suicide. The court understands the sense of urgency experienced by counsel who seek to secure the release of persons from detention believed unlawful. We also acknowledge that the best of lawyers understand, sympathize with, and act upon the real hardships experienced by their clients. By all accounts, the highly motivated counsel for the plaintiffs upheld the highest standards of the legal profession in this

regard. Yet, we must again conclude, in light of *Pierce*, that meeting the unique emotional burdens in this case constituted one of the many features of this case which might increase our esteem for the lawyers involved but does not constitute a special factor under the EAJA. *Cf. Pierce*, 108 S.Ct. at 2554 (undesirable cases do not, by themselves, give rise to special factors).

d. The Government's Litigious Position

The district court was clearly disturbed by the United States' general posture in this litigation:

> The government took an unusually unwavering and litigious position throughout the litigation. Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiffs' contentions at every turn. From pretrial discovery, through trial and successive appeals, the government moved for stays of Court Orders, forced repeated applications for emergency relief, put Plaintiffs in a posture requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as law, each and every important issue asserted by Plaintiffs.

646 F.Supp. at 1318. We have no quarrel with the district court's observations, that court being uniquely situated to observe the conduct of the lawsuit. *Pierce* gives little guidance as to what can constitute a special factor except for its discussion of certain adjustments specifically discussed as not being "special factors." As with the establishment of a standard to test the question of substantial justification, the Court appears to have recognized that judicial construction of the "special factor" term is likely to evolve with time. Thus, on remand, the district court should be free to approach this question anew, and consider potential special factors that would be consistent with *Pierce* and our discussion here, including whether the government's unusually litigious position in this case might consitute a special factor.[13] The court should remember, however, that nothing "routine" or "generally applicable" to a "broad spectrum of litigation" can count. *See* 108 S.Ct. at 2553.

C. Other Components of the Award

1. Costs

The EAJA authorizes the recovery of three types of litigation expenditures. First, under 28 U.S.C. § 2412(a), a prevailing party opposing the United States in "any civil

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[13] For example, under Rule 11 courts are required to distinguish between contentions that often have no "reasonable basis in law or fact" and those also injected without any purpose but to harass. *See generally* Fed.R.Civ.P. 11 advisory committee's note. Sanctions under Rule 11 are meant to eliminate frivolity *and* harassment, not attorney zealousness. *Id. See also Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir.1986). As the dissent points out, the EAJA already requires that the government's position have no "reasonable basis in law and fact" as a condition precedent to the recovery of fees. The EAJA does not, however, protect a litigant against potential government harassment. It is easy to imagine a situation where a position that is not "substantially justified" is exacerbated by improper purposes in defending the lawsuit. For instance, if the government were aware that the cost of doing business of certain of the plaintiffs' attorneys exceeded the EAJA cap of $75.00 per hour, the government might adopt an aggressive, litigious strategy in order to deter the plaintiffs' attorneys by actually forcing these attorneys to operate at a loss. We do not suggest that this situation occurred, but it is illustrative of how an improper purpose can be a factor that is additional to a "frivolous" position. Thus, if the government in this case advanced litigation for any improper purpose such as harassment, unnecessary delay or increase in the plaintiffs' expense, then consistent with *Pierce*, its action warrants the imposition of a special factor.

action" "may be awarded" costs as delineated in 28 U.S.C. § 1920. The second and third types of expenditures included in the statute are "fees and other expenses," which a district court must award to a party who prevails against the United States in "any civil action (other than cases sounding in tort)" when the government fails to demonstrate that its position was substantially justified. 28 U.S.C. § 2412(d)(1)(A).

The government contests the district court's award of certain litigation expenditures that the district court found to constitute "fees and other expenses." The Act provides a partial definition of these terms:

> "fees and other expenses" include the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project *which is found by the court to be necessary for the preparation of the party's case,* and reasonable attorney's fees . . . ;

28 U.S.C. § 2412(d)(2)(A) (emphasis added).

The government argues that these terms must be given a limited construction since the EAJA represents a waiver of the United States' sovereign immunity. The problem with this interpretation is that "fees" and "expenses" are defined in the Act by example, rather than by limitation. In this regard, we agree with the following observations by Chief Judge Alaimo of the Southern District of Georgia:

> Turning . . . to the structure of the definitions contained in the EAJA, it appears that where the drafters used the word "includes" they intended to provide a *non-exhaustive* list of examples to clarify the meaning of the term. For example, § 2412(d)(2)(G) provides that " 'court' *includes* the United States Claims Court," (yet that section may not be interpreted to mean that *this Court* would not meet the statutory

> definition); likewise, in § 2412(d)(2)(C), " 'United States' *includes* any agency and any oficial of the United States acting in his or her official capacity." Where Congress intended a more exclusive definition, it used the word "means," as in § 2412(d)(2)(B), Where "party" *means* an individual with the appropriate net worth. Several circuits have construed "fees and other expenses" to encompass "costs that are ordinarily billed to a client." *International Woodworkers of America v. Donovan*, 769 F.2d 1388, 1392 (9th Cir.1985) [*opinion amended*, 792 F.2d 762 (9th Cir.1985)]; *Aston v. Secretary of Health and Human Services*, 808 F.2d 9, 12 (2d Cir.1986). The Court agrees with the conclusion of these cases that the list of expenses provided in § 2412(d)(2)(A) was not meant to be all-inclusive.

City of Brunswick v. United States, 661 F.Supp. 1431, 1444-45 (S.D.Ga.1987) (emphasis in original), *rev'd on other grounds*, 849 F.2d 501 (11th Cir.1988).

Although some circuits have read this provision more restrictively, they have done so largely without analysis or for reasons with which we disagree. *See Wyandotte Savings Bank v. NLRB*, 682 F.2d 119 (6th Cir.1982); *Action on Smoking and Health v. C.A.B.*, 724 F.2d 211, 223-24 (D.C.Cir.1984); *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir.1986). *Wyandotte* suggests that no litigation expenditure (other than attorney's fees) is recoverable under the EAJA unless it is one of the costs enumerated in 28 U.S.C. § 1920. *See* 682 F.2d at 120. This approach reads key language out of the Act. Section 2412(d)(1)(A) provides that "fees" and other "expenses" are awarded "*in addition to* any costs awarded pursuant to subsection (a)," the subsection treating section 1920 costs. *Action on Smoking*, without analysis, holds that the EAJA does not authorize an award for expenses similar to those awarded

in this case. 724 F.2d at 223-24. It relies instead on *NAACP v. Donovan*, 554 F.Supp. 715, 719 (D.C.Cir. 1982). The *NAACP* opinion, however, reads the Act to authorize only those "expenses" listed in subsection 2412(d)(2)(A) or those of a like nature. We will not apply the rule of statutory construction known as *ejusdem generis* in this case for the reasons given by Judge Alaimo in *City of Brunswick*. *Weakley* is unhelpful because it relies totally on *Wyandotte* and the D.C. Circuit's rulings on the matter.

An examination of the nature of the expenses listed in the Act reinforces our reading of it. Items such as engineering reports and studies are extraordinary expenditures not commonly necessary to the preparation of a lawsuit. By including these unusual items in the list of reimbursable expenses, Congress enlarged, rather than contracted, the category of expenditures that are reimbursable under the EAJA. Thus, we reject the government's argument that telephone, reasonable travel, postage, and computerized research expenses are not compensable under the EAJA. *See International Woodworkers of America v. Donovan*, 792 F.2d 762, 767 (9th Cir.1985) (expenses routinely billed to a client—telephone, air courier, attorney travel—are recoverable under the EAJA); *Aston v. Secretary of Health and Human Services*, 808 F.2d 9, 12 (2d Cir.1986) (affirming award of telephone, postage, travel and photocopying expenses).

The limitation on the amount and nature of such expenses is that they must be "necessary to the preparation of the [prevailing] party's case." 28 U.S.C. § 2412(d)(2)(A). "In contrast, expenses of an attorney that are not incurred or expended solely or exclusively in connection with the case before the court, or which expenses the court finds to be unreasonable or unnecessary in the pending litigation, cannot be awarded under the EAJA."

Oliveira v. United States, 827 F.2d 735, 744 (Fed.Cir.1987). We hold that the challenged expenses may be reimbursed under the EAJA.

2. Paralegal and Law Clerk Time

The district court awarded reimbursement for time spent by paralegals and law clerks where the work was that normally done by an attorney. The hourly rate awarded was $40. This is the rate at which the law firm whose paralegals and clerks were involved bills its clients. The government challenges the rate awarded, and contends that paralegal time is recompensable only at the actual cost to the plaintiffs' counsel. In the context of a Title VII case, we have held that paralegal time is recoverable as "part of a prevailing party's award for attorney's fees and expenses, [but] *only to the extent that the paralegal performs work traditionally done by an attorney.*" *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. Unit B 1982). The same analysis applies here. To hold otherwise would be counterproductive because excluding reimbursement for such work might encourage attorneys to handle entire cases themselves, thereby achieving the same results at a higher overall costs. *See Berman v. Schweiker*, 531 F.Supp. 1149, 1154-55 (N.D.Ill.1982), *aff'd*, 713 F.2d 1290 (7th Cir.1983). We affirm the award of law clerk and paralegal fees.

3. Fees for Fees

The last question we consider is whether the district court erred in awarding attorney's fees for the fee litigation without first determining that the government's position in the fees proceedings was without substantial justification. The district court relied on a statement in *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1500

(11th Cir.1986), which lends support to this approach. As the government notes in its brief, however, that portion of *Haitian Refugee Center* upon which the district court relied, was later vacated by the *Haitian Refugee Center* panel. 804 F.2d 1573, 1574 (11th Cir.1986).

Those circuits that have discussed the question of "fees for fees" in the EAJA context are divided. Two circuits have indicated that a successful EAJA fee applicant should not recover attorney's fees associated with litigating the fee issues unless the government's position in the attorney's fee litigation is not substantially justified. *See Rawlings v. Heckler*, 725 F.2d 1192, 1196 (9th Cir.1984) (no fees for defending EAJA award on appeal if government's appellate position is reasonable); *Russell v. National Mediation Board*, 775 F.2d 1284, 1285, 1291 n. 8 (5th Cir.1984) (no fees for fee application where agency defense to award was partially meritorious).

The D.C. Circuit has recognized a substantial difficulty with this approach:

> [I]f we require every victorious EAJA plaintiff to make a separate claim for fees for bringing the first EAJA suit, and permit the government to claim that its first EAJA defense was substantially justified on the merits, we face the distinct possibility of an infinite regression of EAJA litigation. A successful EAJA plaintiff will bring another suit claiming fees for bringing the EAJA suit, and the government will defend on the ground that its EAJA defense was substantially justified. If the plaintiff wins this suit, yet a third suit will be required to recover fees for the second suit recovering fees. And if the government contests this suits and loses, yet a fourth suit will have been spawned, and so on. In our opinion the *per se* fee-shifting rule is the least objectionable exit from this Kafka-esque judicial nightmare; in most cases a loss on the generous "substantially justified" EAJA threshold strongly indicates that the government is clinging to an unreasonable position.

Cinciarelli v. Reagan, 729 F.2d 801, 810 (D.C. Cir.1984) (footnote omitted). The D.C. Circuit did not squarely hold, however, that successful EAJA fee applicants are automatically entitled to "fees for fees." In a subsequent case, it has held that the government may raise certain technical defenses, such as an untimely filing by the fee applicant, and defend against an application for "fees for fees" on the ground that the technical defense is substantially justified. *American Academy of Pediatrics v. Bowen*, 795 F.2d 211, 214 (D.C.Cir.1986).

The Third Circuit has adopted still a different approach. Where "the sole basis for the opposition [to EAJA fees] is the alleged substantial justification of the government's position in the underlying proceedings," the fee applicant "will almost always, if not always, be entitled to fees for litigation over an EAJA fee petition if she is entitled to fees for the underlying litigation." Yet where the government's opposition to EAJA fees is based on other contentions, "an application for fee petition expenses can present issues not resolved by the proceedings on the original fee petition." *Russell v. Heckler*, 814 F.2d 148, 155 (3d Cir.1987), *vacated on other grounds*, ____ U.S. ____, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988) (for reconsideration of attorney's fees in light of *Pierce*). As to these issues, the Third Circuit grants the government the opportunity to defend its position as substantially justified. *Id.*

Only the Second Circuit has held that the government's position in the fee litigation is irrelevant to a determination whether a successful EAJA fee applicant can claim "fees for fees." As Judge Pratt explained for the court,

> To begin with, the very purpose of the EAJA is to ensure that persons aggrieved by unreasonable governmental actions are not prevented from vindicating

their claims by the potentially high costs involved in doing so. Since the statute primarily assures prevailing plaintiffs their reasonable attorney's fees, it would be ironic if claiming those very fees—which would have been unnecessary if not for the government action—was the one act for which a claimant could not receive compensation. Since the purpose of the EAJA is to remove counsel fees as an impediment to challenging unreasonable and unjustified governmental actions, where a governmental action has been known to have been unjustified, there should be as little disincentive for plaintiffs to obtain attorney's fees as there is for them to challenge the action itself. The government asks us "to treat the EAJA application as part of counsel's cost of doing business." To do so, however, would leave it in the power of the government, which already had been unjustified in its actions toward plaintiff, to so raise the cost of plaintiff's counsel's "doing business" simply by strenuous resistance to all fee applications as to discourage or economically prevent a plaintiff from litigating against the government in the first place. We regard it as more consistent with the congressional purpose to treat plaintiff's fee application as part of the government's cost of taking positions that are not substantially justified.

Trichilo v. Secretary of Health and Human Services, 823 F.2d 702, 707 (2d Cir. 1987). We agree with these sound reasons for awarding "fees for fees." It would contravene Congress's purpose in passing the EAJA to require under all circumstances that successful EAJA fee applicants bear the costs of obtaining EAJA fees. This court has already indicated that attorney's fees incurred defending an EAJA award on appeal, or appealing a denial of EAJA fees, are

recoverable as part of the final fee award. *Hudson v. Secretary of Health and Human Services*, 839 F.2d 1453, 1458 n. 7 (11th Cir.1988). *See also Trichilo v. Secretary of Health and Human Services*, 832 F.2d 743 (2d Cir.1987). We agree with the D.C. Circuit that a fixed rule permitting infinite litigation of the substantial justification question would make for unwise judicial policy. We hold, therefore, that the United States may not oppose a "fees for fees" request solely on the ground that its position in the fee litigation was substantially justified.[14]

IV. CONCLUSION

To summarize, we hold that the district court acted within its discretion in determining that the government's position in the underlying litigation was not substantially justified but that the case must be remanded for recalculation of attorney's fees and expenses in accordance with this opinion.

AFFIRMED IN PART, VACATED AND REMANDED.

KRAVITCH, Circuit Judge, concurring and dissenting:

I concur in Parts I, II and III A of the majority's opinion. The majority, however, permits an award of fees in excess of the $75 statutory cap for three reasons with which I disagree; I therefore respectfully dissent from Parts III B and IV.

First, I do not agree that the award of cost-of-living adjustments for services rendered prior to 1985 is permissi-

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[14] We express no opinion as to whether a "technical defense" exception to this rule should exist as the government has not briefed the issue.

ble. In 1985, Congress provided that "attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living . . . justifies a higher fee." Assuming Congresss meant what it said, Congress considered $75 per hour reasonable compensation given the cost of living in 1985. With a positive rate of inflation (*see Hirschey v. F.E.R.C.*, 777 F.2d 1, 5 n. 24 (D.C.Cir.1985)), $75 was *a fortiori* reasonable compensation given the cost of living in the years 1980 through 1984.

The Second Circuit in *Trichilo v. Secretary of Health and Human Services*, 823 F.2d 702 (2d Cir.1987), rejected this interpretation "as contrary to the legislative intent, unjustified under tenets of statutory construction, and inevitably bound to lead to incongruous results." *Id.* at 705. The court cited language in the statute providing that the Equal Access to Justice Act " 'shall be effective on or after the date of the enactment of this Act *as if [it] had not been repealed.*' " *Id.* (emphasis in original). In my view, however, these general words do not sanction disregard of particular language setting the cap at $75 per hour. *Cf. Estate of Flanigan v. Commissioner*, 743 F.2d 1526, 1532 (11th Cir.1984).

Exercising insight into the congressional decisionmaking process, the *Trichilo* court opined that Congress "made no decision that $75, measured in 1985 dollars, was still an appropriate cap. . . ." 823 F.2d at 705. The court also noted that it was not "told why the 1985 congress, obviously concerned . . . about inflation . . . , would want to ignore the inflation that had occurred between 1981 and 1985." *Id.* at 706. *See also Allen v. Bowen*, 821 F.2d 963, 967 (3d Cir.1987) (legislative history does not suggest that Congress's "decision not to raise the $75 flat hourly rate was in any way indicative of its desire to reduce the cost of living adjustment"). One answer to the *Trichilo* court's

query is that Congress has no duty to explain itself. Moreover, Congress in 1985 still may have felt that $75 an hour was a reasonable rate for the public funding of lawsuits, notwithstanding any concern for inflation.

Courts relaxing the cap have referred to the sound principle that Congress is presumed to be aware of prior judicial constructions of its statutes. *Trichilo*, 823 F.2d at 706; *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 522 (1st Cir.1987). Invoking this principle does not, however, counter the possibility that by the very act of preserving the $75 cap, Congress evidenced an intent to modify the applicability of prior judicial decisions.

Courts also advance the time-honored "absurd result" argument in support of a holding that cost-of-living adjustments prior to 1985 are permissible. *Trichilo*, 823 F.2d at 706-07; *Sierra Club*, 820 F.2d at 523. I find it plausible that Congress struck a balance between attorney compensation and concerns over an ever-increasing federal budget deficit. *See Pierce*, 108 S.Ct. at 2554 ("Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be"). Such a compromise may have been necessary in order to insure the re-enactment of the Equal Access to Justice Act. If so, the $75 cap represents a reasonable political compromise not open to judicial "interpretation." *Cf. Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 865-66, 104 S.Ct. 2778, 2793, 81 L.Ed.2d 694 (1984). But if no such balance was struck, and Congress in fact erred, the problem is for Congress, not the courts, to remedy.

Second, I also disagree with the majority's holding that a lawyer specializing in immigration law may possess a special skill entitling him to increased fees. The depths of fourth-amendment law or first-amendment law, for example, are no less murky than the recesses of immigration

law. With the precedent of the majority opinion, district courts will find it difficult to identify a legal specialty that does not justify an increase.

In its discussion of "special factors," the *Pierce* Court stated:

> We think [the phrase] refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.

108 S.Ct. at 2554. Patent law and foreign law are narrow areas of specialization that generally require learning not common to lawyers in the United States. By contrast, competence in immigration law requires no peculiar base of knowledge; an attorney with a reasonable amount of "general lawyerly knowledge and ability" can learn immigration law. According a premium for knowledge of immigration law therefore runs counter to the Supreme Court's counsel to "preserve the intended effectiveness of the $75 cap." *Id.*

Finally, I question whether the government's "litigious position" may properly constitute a "special factor." The district court described the government's posture as follows:

> Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiff's contentions at every turn. From pre-trial discovery, through trial and successive appeals, the government moved for stays of Court Orders, forced repeated applications for emergency relief, put Plaintiffs in a posture requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as law, each and every important issue asserted by Plaintiffs.

646 F.Supp. at 1318. The majority opinion instructs the district judge to take a fresh look at whether this behavior constitutes a "special factor," advising that nothing "routine" or "generally applicable" to a "broad spectrum of litigation" can count (citing *Pierce*, 108 S.Ct. at 2554), but suggesting that "[i]t is easy to imagine a situation where a position that is not 'substantially justified' is exacerbated by improper purposes in defending the lawsuit." *Ante* note 13.

Certainly, government lawyers should be no less zealous than private lawyers. As outlined by the district court, the attorneys were simply making full use of available process to advance the interests of their clients, the United States. I see no reason why attorney zeal should be a "special factor," for Congress surely anticipated the zeal of its own lawyers when it set the $75 cap. Moreover, as a finding that the government's position had no "reasonable basis both in law and fact" in a condition precedent to every EAJA award, allowing a premium based on the government's "contentions and litigating postures" will likely lead courts to double-count the substantial-justification factor. Rule 11 sanctions are always available to compensate "a litigant whose opposent acts in bad faith in instituting or conducting litigation." Fed.R. Civ.P. 11 advisory committee's note.

As I would hold that premiums in excess of $75 per hour are not available for inflation prior to 1985, for knowledge of immigration law, or for the government's posture in litigation, I respectfully dissent from Parts III B and IV of the court's opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260-CIV-SPELLMAN

LUCIEN LOUIS, ET AL., PLAINTIFFS

v.

ALAN NELSON, ET AL., DEFENDANTS

CORRECTED MEMORANDUM OPINION AND ORDER ON ATTORNEY'S FEES, COSTS AND EXPENSES

[Filed Oct. 1, 1986]

INTRODUCTION

This matter is before the Court for a determination of the amount of attorney's fees, costs and expenses to be paid by the government to Plaintiffs' counsel[1] under the

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[1] This Court originally entered a Memorandum Order on Attorney's Fees, Costs and Expenses on August 29, 1986. Subsequent to the entry of the Order the Plaintiffs brought to the Court's attention, by a Motion to Amplify the Court's Order, a recent order of the Ninth Circuit Court of Appeals in *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985) (Order of August 11, 1986). This Order remanded the case, in part, to the District Court to reconsider its award of a multiplier to Plaintiffs' counsel in light of three recent Supreme Court decisions – *Pennsylvania v. Delaware Valley Citizens' Council for Clean*

Equal Access to Justice Act[2] ("EAJA") and related statutes.[3] The Court has ruled, by separate order, that the Plaintiff's counsel are entitled to such an award.[4] Thus, the only matter which must be resolved is the precise amount to be paid to counsel by the government.

I

BACKGROUND

The last two decades have witnessed an influx of refugees into the United States, particularly the South Florida area, that has been perhaps unprecedented in what is considered peacetime.

The government's handling of refugees who arrived from Haiti, the poorest nation in the Western Hemisphere, came under fire in a series of lawsuits filed in the late 1970's and early 1980's. The bulk of these lawsuits were brought by attorneys and human rights activists who sought to protect the civil rights of the Haitian refugees. The litigation that arose from the alleged abuse of those rights was lengthy and bitter.

Air, 106 S.Ct. 3088 (1986); *Library of Congress v. Shaw*, 106 S.Ct. 2957 (1986); *City of Riverside v. Rivera*, 106 S.Ct. 2686 (1986). Upon review of Plaintiffs' motion and memorandum this Court vacated its August 29, 1986 Order to correct any defects in that Order. The Court has now reviewed the three recent Supreme Court decisions and finds that only *Pennsylvania v. Delaware Valley Citizens' Council*, affects the Court's Order of August 29, 1986. In light of that decision and Plaintiffs motion and memorandum the Court has now corrected its decision herein.

[2] 28 U.S.C. § 2412.

[3] 28 U.S.C. § 1920, 28 U.S.C. § 1961.

[4] *Jean v. Nelson*, No. 81-1260 (S.D. Fla. Dec. 6, 1986) (order granting entitlement to attorney's fees). Portions of said Order are reiterated herein; the Order in its entirety is attached hereto as an Appendix.

This case began in response to implementation by the INS of a new policy of accelerated exclusion proceedings and detention without parole of all Haitian refugees.[5] In essence, the litigation had two primary goals. First, the Plaintiffs sought to stop the mass exclusion hearings which were being held without counsel. And second, Plaintiffs sought to obtain the release from detention of class members pending the determination of their political asylum applications, thereby restoring to full force and effect the prior policy of parole pending individual exclusion proceedings.[6]

After a lengthy trial, this Court held that the new detention policy was adopted in violation of the Administrative Procedure Act ("APA") and that the Plaintiffs' continued

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[5] The background to this litigation is discussed in *Louis v. Nelson*, 544 F. Supp. 973, 978-981 (S.D. Fla. 1982) and in the Eleventh Circuit's panel opinion, *Jean v. Nelson*, 711 F.2d 1455, 1464-1474 (11th Cir. 1983).

[6] The Complaint, filed on June 16, 1981, asserted seven causes of action. Count I challenged the commencement of preliminary interviews for Haitian refugees without the presence of counsel or notice of the right to counsel; Count II challenged the legality of the new detention policy, which was not promulgated pursuant to the rule-making requirements of the APA; Count III challenged the failure to advise class members of their procedural rights at exclusion hearings; Count IV challenged the denial of access to counsel; Count V challenged the denial of public excluison hearings; Count VI challenged the denial of the right to apply for political asylum; and Count VII challenged the lawfulness of the new Haitian program in its entirety under the equal protection clause. In a Memorandum Opinion and Order dated February 24, 1982, this Court dismissed Counts I, III, V and VI in their entirety and Counts IV and VII in part. It retained jurisdiction over Count II; Count IV insofar as its alleged that counsel and that the Haitian Refugee Center had a claim of access to those persons in detention; and Count VII insofar as it alleged that the detention policy was applied in a discriminatory fashion. *Louis v. Meissner*, 532 F. Supp. 881 (S.D. Fla. 1982).

incarceration pursuant to this policy was unlawful. *Louis v. Nelson*, 544 F. Supp. 973, 993-97 (S.D. Fla. 1982). Ten days later, this Court declared the new detention policy "null and void" as to the defined class, and ordered the release of its members "forthwith" pursuant to a carefully drafted release plan. *Louis v. Nelson*, 544 F. Supp. 1004, 1006-07 (S.D. Fla. 1982). Thus, the Plaintiffs effectively obtained both of the goals they set out to achieve. As a direct result of this litigation, the Defendants stopped the accelerated mass exclusion hearings and class members were released from incarceration.[7] These results were affirmed by the Eleventh Circuit panel. *See Jean v. Nelson*, 711 F.2d 1455, 1510 n.63 (11th Cir. 1983). The *en banc* court dismissed the Defendant's appeal of this Court's decision on the APA issue, thus leaving the results Plaintiffs obtained undisturbed. *See Jean v. Nelson*, 727 F.2d 957, 962 (11th Cir. 1984), *aff'd in part*, 105 S.Ct. 2992 (1985).[8]

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[7] The relief obtained by the Plaintiffs mooted many of the issues raised in the Complaint. Plaintiffs were released from detention and indirectly obtained counsel or notice of the right to counsel, thereby ensuring that class members would have notice of their procedural rights at exclusion hearings (Count III), including the right to apply for political asylum (Count VI). As a result of this lawsuit, defendants stopped their practice of preventing lawyers from contacting Haitians at closed exclusion hearings (Count I). With the release of class members, Plaintiffs have had access to class members (Count IV). Also as a direct result of this litigation, the INS promulgated new parole regulations which are facially neutral and which require parole decisions to be made without regard to race or nationality. *See* 8 C.F.R. § 212.5 (1985).

[8] The Eleventh Circuit panel that originally heard this matter found that the defendants discriminated against the Plaintiff class in the enforcement of the new detention policy and that the Plaintiffs were therefore denied equal protection. *Jean v. Nelson*, 711 F.2d at 1509. The Eleventh Circuit, sitting *en banc*, however, held that excludable

The results of this litigation were clearly overwhelming and important. To be sure, the Plaintiffs waited anxiously for the vindication of their rights; the attorneys, who brought this suit *pro bono publico,* have waited to be compensated for their efforts. Moreover, the government used all of its considerable resources in opposing Plaintiffs' contentions at every turn. From pre-trial discovery, through trial and successive appeals, the government moved for stays of Court Orders, forced repeated applications for emergency relief, put Plaintiffs in a posture requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as law, each and every important issue asserted by Plaintiffs.

The Court has reviewed in detail hundreds of pages of affidavits in which counsel outlined their hours, costs and expenses, and their customary fees. Counsel calculated their fees under several theories, taking into account any reduction which the Court indicated it would make to reflect its finding that the position of the government concerning the equal protection issue was reasonable. In addition to having the affidavits before it for review, the Court has had the benefit of five days of hearings including expert testimony, and has carefully assessed the credibility of the witnesses presented.

Thus, the Court has significant documentation and testimony on which to base its findings. Furthermore, having presided over this litigation from soon after its inception, the Court is uniquely able to evaluate the skill, diligence, contribution and effectiveness of counsel.

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aliens have no constitutional rights with respect to their applications for admission, asylum, or parole. *Jean v. Nelson,* 727 F.2d 957 (11th Cir. 1984) (*en banc*). The Supreme Court held that the *en banc* court should not have reached the constitutional issue because under the statutes and regulations now in effect, parole decisions must be made without regard to race or national origin. *Jean v. Nelson,* 105 S.Ct. at 2998.

II

FIGURES INVOLVED

The following charts reflect the preliminary amounts of costs, expenses and fees requested by counsel. These figures do not take into consideration any reduction or enhancement for any purposes, but serve simply to acquaint the reader with the sums involved in a case of this magnitude.

Costs and Expenses

Attorney	§ 1920 Costs	EAJA Expenses	Total
HRC, Inc.	$47,204.82	$39,081.25	$86,286.07
Fried, Frank	39,951.34	56,374.26	95,325.60
Bruce Winick	-0-	1,372.90	1,372.90
Wald, Harkrader	-0-	499.82	499.82

Attorneys Fees

Attorney	Total Hours	Hourly Rate	Total
I. Kurzban	2,172.5	$125.00	$271,562.50
I. Stotzky	1,194.85	125.00	149,356.75
B. Winick	1,476.75	125.00	184,593.75
V. Weisz	628.2	75.00	47,115.00
C. K. Hall	97.8	100.00	9,780.00
Wald, Harkrader	62.75	75.00-85.00	4,973.00
M. Rosen	620.00	125.00	77,500.00
Fried, Frank (atty.)	3,821.00	50.00-175.00	419,071.00
Fried, Frank (para.)	1,188.00	40.00	47,524.00

III

THE STANDARD

The Equal Access to Justice Act provides for the award of reasonable expenses and attorney's fees in the litigation. 28 U.S.C. § 2412(d)(2)(A). Pursuant to the EAJA "attorney's fees shall not be awarded in excess of $75.00 per hour unless the court determines that an increase in the cost of living or special factors, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." *Id.*[9]

Under the governing Eleventh Circuit precedent, the factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) should be applied by the Court in determining a reasonable fee within the scope of the Equal Access to Justice Act. *Florida Suncoast Villas, Inc. v. United States*, 776 F.2d 974, 975 (11th Cir. 1985). Of course, the *Johnson* factors are not exhaustive. *Pennsylvania v. Delaware Valley Citizens' Council*, 106 S.Ct. 3088 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

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[9] § 2412(d)(2)(A) states:

"fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

The Court must thus apply these various factors in ascertaining the reasonableness of the attorney fee request. In ascertaining the appropriate hourly rate, the EAJA limits the amount to $75.00 per hour unless the Court makes additional findings to justify an increased hourly rate based upon an increase in the cost of living or "special factors." In addition to these statutory criteria justifying a greater than $75.00 per hour rate, the Court may further enhance the total attorney's fee. The Court may enhance the fee upon a finding by the Court of the existence of factors *other than* those appropriate in ascertaining a reasonable fee as well as an appropriate hourly rate under the Equal Access to Justice Act. *Pennsylvania v. Delaware Valley Citizens' Council, supra; Blum, supra; Hensley, supra.*

In the instant case, the Court has already found that the Plaintiffs were the prevailing party for purposes of awarding them attorneys' fees and other expenses under the EAJA. The Court further found that the government's position on the Administrative Procedure Act ("APA") issue was not substantially justified, but that any award would be adjusted downward to reflect the fact that the government's position was not unreasonable as to the equal protection claim. The Court observed, however, that "there was considerable overlap between the APA and the equal protection claim." (Appendix, p. 12).

Additionally, the Court noted that "[b]ecause the litigation before the Supreme Court concerned only the equal protection claim the Plaintiffs are not entitled to compensation under the EAJA for their efforts in that Court." (Appendix, p. 14 n.8). The possibility of partially compensating the Plaintiffs for those efforts was not entirely ruled out, since the government's change in position concerning their argument on whether nationality could be a factor in determining whether an alien could be paroled may have unnecessarily prolonged the litigation.

Thus, the Court must first ascertain what a reasonable number of hours are for each counsel; what an appropriate hourly rate under the EAJA should be for each counsel; and whether an enhancement or diminution of the fee thus calculated is appropriate.

IV

THE JOHNSON FACTORS

The Court will begin its analysis by examining the facts of this case under the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 458 F.2d 714 (5th Cir. 1974).[10] Such an analysis will provide the basis for determining the reasonable number of hours expended by each counsel and whether the hourly rate should be $75.00 or less. *Florida Suncoast*, 775 F.2d at 976.

A. *The time and labor required.*

This lawsuit was commenced more than five years ago. The class action suit involved numerous plaintiffs. The

[10] The twelve factors are:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience reputation and ability of the attorneys';
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

record in this case includes seventeen volumes of pleadings, a forty-five volume trial transcript, and a docket, containing over six hundred entries. These reflect the enormous amount of time and labor devoted to this case.

The time spent by counsel on this lawsuit is listed earlier in this Order. The Court points out that the attorneys have already reduced their hours to reflect the hours spent on the equal protection claim and the time spent at the Supreme Court level. Thus, the hours spent by counsel for which they seek compensation are considerably lower than those listed previously in this Order.[11] The revised schedule of hours, as prepared by counsel, reads as follows:

Attorney	Total Hours	(E.P. Hours)	(60% S.Ct.)	Reimbursable Hours
I. Kurzban	2,172.5	(66.4)	(268.17)	1,837.93
I. Stotzky	1,194.85	(15.0)	(276.00)	903.85
B. Winick	1,476.75	(23.0)	(153.48)	1,300.27)
V. Weisz	628.2	(0)	(0)	628.2
C. Hall	97.8	(0)	(0)	97.8
M. Rosen	620.0	(0)	(46.2)	573.8
Wald, Harkrader	62.75	(0)	(0)	62.75
Fried, Frank (Atty)	3,821.0	(363.0)	(674.4)	2,783.6
(Para)	1,188.1	(0)	(186.06)	1,002.04
TOTAL	11,261.95	(467.4)	(1,604.31)	9,190.24

Several factors added to the volume of hours spent in litigating this case. First, local counsel had to confer with out-of-state counsel on virtually every step taken. The

[11] This table reflects the figures proposed by Plaintiffs' counsel. As will become apparent, the figures will be revised by the Court.

local attorneys, Ira Kurzban, Irwin Stotzky, Bruce Winick, Vera Weisz, Michael Rosen, and for a certain period of time Christopher Keith Hall, had to maintain constant contact with co-counsel in New York, Robert Jucean and his law firm Fried, Frank, Harris, Shriver & Jacobson, and at the initial phases, the Washington law firm of Wald, Harkrader & Ross. Naturally, having counsel located in more than one place adds to the number of hours required to prosecute a case, but there is certainly no prohibition against having local and out-of-state counsel work on one lawsuit; it is quite common.

Second, the Plaintiffs faced a formidable foe. The government had, at one time or another, thirty different attorneys working on the case. Naturally, the Plaintiffs had to respond in kind with their own forces, although the Court notes that Plaintiffs had approximately one half the number of counsel.

Third, as the Court mentioned in its December 6, 1985 Order, the government's change in position regarding the plaintiffs' claim that the government did in fact have a detention policy that was instituted *ultra vires* of the APA, served simply to prolong the litigation unnecessarily.

Fourth, although the Court noted at one point that the APA claim might be appropriate for summary judgment, it did not so find. Indeed, when Plaintiffs requested summary judgment before trial, the government opposed them.

Finally, the government also forced Plaintiffs to litigate constitutional claims that would not have needed to be litigated if the government had conceded at the trial level that the INS was precluded by statute and regulations from making nationality-based decisions—a position they did not adopt until argument before the Supreme Court.

In short, having first hand knowledge of the demands of this case, the intensity and length of the pleadings, briefing

and argument and the time schedules involved, the Court is in the perhaps unenviable position of knowing that the time spent by Plaintiffs' counsel in the prosecution of this case has been reasonable and well supported by the record.

The government took issue with the record keeping of Plaintiffs' counsel. The Court finds this contentiousness to be without merit. For five years the attorneys kept accurate time sheets, setting forth the time spent and the nature of work involved. Counsel were extensively cross-examined by the government, and all responded to the satisfaction of the Court that by and large, time sheets reflected contemporaneous record keeping. The Court has in its possession exhibits which include the time sheets for counsel and finds any inadequacies in record keeping to be inconsequential.

B. ***The novelty and difficulty of the questions.***

There can be little serious dispute but that this has been a novel and complex case. Mere volume does not necessarily indicate complexity, but in the instant case, the size of the record and the passage of time do signify what has been the product of extreme complexity and difficulty. The appellate court does not differ with this view. *Jean v. Nelson*, 711 F.2d 1455, 1462 (11th Cir. 1983).

C. ***The skill requisite to perform the legal services properly and the experience, reputation and ability of the attorneys.***

The Court finds that these factors must be considered together, rather than separately as they are listed in *Johnson*. These factors are intertwined, and must be discussed in context. Each attorney or firm will be addressed individually so that their particular role in this case will be give fair credit.

Ira J. Kurzban

Ira J. Kurzban's abilities and dedication as an immigration lawyer and champion of the public interest are nationally renowned. He has been identified by the *National Law Journal* as one of this country's twenty leading immigration law experts and has been described as "an extremely capable lawyer of widely recognized legal skill and dedication to the poor and disadvantaged," *Haitian Refugee Center, Inc. v. Smith,* Case No. 79-206-CIV-JLK, slip op. at 13 (S.D. Fla. May 24, 1984).

As counsel for the National Council of Churches of Christ in the United States and the National Emergency Civil Liberties Foundation, he has litigated and been counsel of record in every class action lawsuit brought on behalf of Haitian refugees in the Southern District of Florida.

He has received local and national recognition and numerous awards for this work. For example, Mr. Kurzban was the first recipient of the Tobias Simon Pro Bono Service Award. This award is given by the Florida Supreme Court; Mr. Kurzban received the award on April 18, 1982. Also in 1982, Mr. Kurzban was recognized by *American Lawyer Magazine* as being one of the most prominent *pro bono* attorneys in the nation. *Esquire* magazine included Mr. Kurzban in a story on new stars to watch. In a special edition of *Newsweek* magazine entitled "Sweet Land of Liberty," Mr. Kurzban was hailed as one of the "New American Heroes." Perhaps one of the achievements of which Mr. Kurzban should be most proud, centers around his creation of and involvement with a student and alumni run *pro bono* program at the University of California at Berkeley Law School.

In addition to his litigation experience with respect to immigration law and international law, he is a nationally

recognized expert in many of the areas of law involved in this case, including political asylum, refugee status, and immigration litigation, and has lectured and published extensively in these areas in respected journals and before sophisticated audiences.

He has taught immigration law, immigration litigation, civil rights, and civil liberties litigation, and has appeared before Congressional Committees on matters concerning immigration legislation.

In sum, when the words "immigration attorney" are uttered, there is little doubt but that the name Ira Kurzban springs to mind.

Fried, Frank

Fried, Frank is a fine law firm with a strong commitment to public interest litigation and has a very high reputation. Despite local counsel's pleas, Fried, Frank, Harris, Shriver & Jacobson was virtually the only firm in the country possessing the requisite resources and experience in both immigration and federal litigation that was willing to participate in this lawsuit without immediate compensation.

Fried, Frank's reputation was attested to by the government itself at the hearing on the issue of attorneys fees: "We would state that with regard to Mr. Juceam's firm, that we have the highest regard for that firm in the Department of Justice . . . ."

Fried, Frank regularly participates extensively in *pro bono publico* practice, for causes liberal and conservative, in support of and in opposition to governmental positions and policy, including immigration and refugee matters.

At any given time, Fried, Frank had numerous attorneys working on the instant case. This is not unusual at a large firm. Rather than list the attorneys and their

achievements, since only their names were put into evidence, the Court will only take notice that the law firm as a whole enjoys a sterling reputation.

Robert E. Juceam, the partner at Fried, Frank who organized and supervised its participation in this case, is an attorney of outstanding ability and reputation, as is reflected in the testimony of his colleagues. The Court points out that Mr. Juceam is not seeking any compensation for himself at all despite the fact that he spent untold hundred of hours working on this case. Mr. Juceam's selflessness and generosity merit special mention by the Court and set an example for all of us.

Mr. Juceam is held in awesome esteem among immigration practitioners even though immigration law is not his exclusive field of practice.

Mr. Juceam's practice has included, on a regular basis, substantial general federal court and agency litigation, in addition to the representation of aliens in the United States and abroad, and of companies seeking to engage aliens for employment in the United States.

A past president of the American Immigration Lawyers Association, Mr. Juceam has also served as the organization's vice president, secretary, liasion committee member to the United States Department of State and of the Immigration and Naturalization Service and on its Board of Governors. He has lectured extensively on immigration law and refugee policy, and has testified before Congressional committees and subcommittees concerning proposed immigration legislation.

Bruce J. Winick

Bruce J. Winick is a tenured full professor at the University of Miami School of Law. He has taught Administrative Law, Federal Civil Procedure, and Federal

Jurisdiction. He is an outstanding scholar and a dedicated teacher.

Professor Winick has been employed as an associate at a large law firm in New York City, by the City of New York in a number of administrative and legal capacities, and has served the American Civil Liberties Union of Florida as its General Counsel.

Professor Winick has extensive litigation experience in state and federal courts, including federal lawsuits involving judicial review of administrative action and also has extensive experience as a consultant to law firms and public litigant groups on the constitutional aspects of administrative law and special procedural issues involved in litigation against the government.

As a result of this experience, Professor Winick is a national expert in the areas of judicial review of agency action, the procedural complexities of litigation against the government, the constitutional subjects of due process and equal protection, and immigration law.

Professor Winick is also an expert in the use of statistics in judicial proceedings and his work in this area was crucial to development of Plaintiffs' discrimination claim.

Irwin P. Stotzky

Irwin P. Stotzky is a tenured full professor at the University of Miami Law School and his reputation is a very high one in this community. Professor Stotzky was instrumental in assisting the great late Soia Mentschikoff, former Dean of the University of Miami School of Law, in elevating the status of the law school to one of the nation's leading institutions.

Professor Stotzky has taught, among other courses, constitutional law, criminal law and constitutional criminal procedure, legal skills and jurisprudence, and im-

migration law. He has published, lectured and consulted extensively in these areas, and in particular in the area of constitutional aspects of immigration litigation.

Professor Stotzky has been involved in litigation in federal and state courts that raised constitutional questions that played an important part in this lawsuit. He consulted or worked directly on several other Haitian cases, playing an important role in litigation of the constitutional claims in these cases.

As a result of this experience, he is recognized as a national expert on the First Amendment, the constitutional subjects of due process and equal protection, international law and immigration law. His expertise was invaluable to the presentation of Plaintiffs' constitutional claims.

Michael J. Rosen

Michael J. Rosen is an outstanding young attorney who enjoys an excellent reputation in the Southern District of Florida.

Mr. Rosen's practice consists almost exclusively of federal criminal litigation. Prior to joining Rosen & Rosen, a Miami firm, he gained hundreds of hours of trial experience as an attorney with the Federal Public Defender's office in the Southern District of Florida.

Mr. Rosen is a member of the Federal Bar Association and was chairperson of the committee for redrafting the Standing Discovery Order entered in all federal criminal cases in the Southern District of Florida.

As the only attorney ready to assist full-time in preparation and conduct of the lengthy trial of Plaintiffs' claims, Mr. Rosen's expertise in federal trial practice was invaluable.

Vera Weisz

Vera Weisz has extensive experience in representation of Haitian refugees. During the course of her employment at Florida Rural Legal Services, Inc. in Belle Glade, Florida, and then at the Haitian Refugee Center, Inc., in Miami, Florida, she has been involved in the representation of over one thousand Haitian refugees seeking asylum in the United States, has represented over five hundred clients at exclusion procedings, deportation, and asylum hearings, and has participated in three major federal lawsuits related to the rights of Haitian refugees. Ms. Weisz has lectured, conducted training seminars, and published on asylum law.

Ms. Weisz was one of the few attorneys in Miami who could speak fluently French and Creole, the language used by most of the class members. Her experience in processing claims of Haitian refugees and her language abilities were crucial to her work in communicating with and preparing the testimony of Haitian plaintiffs and witnesses.

Christopher K. Hall

Christopher K. Hall has extensive experience in the areas of international and immigration law. He has contributed his time to the Lawyers Committee for International Human Rights in connection with refugees and asylum applications and has taught international law, international human rights and international organizations at the University of Miami Law School.

He also has extensive litigation experience. He frequently argues in the Second Circuit and the New York State Court of Appeals and intermediate appellate courts and has worked on three Supreme Court cases.

Mr. Hall also worked as an associate at Kurzban, Kurzban & Weinger, P.A. and at the New York Attorney General's office.

Wald, Harkrader

Two attorneys from the Washington, D.C. law firm of Wald, Harkrader participated in the initial stages of the lawsuit and seek compensation for their services. These two attorneys, Mary Coombs and Mark Stern, also enjoy fine reputations in the legal community.

D. *The quality of the work.*

In determining the appropriate fee, the Court must also consider the quality of counsels' performance. *Pennsylvania v. Delaware Valley Citizens' Council, supra.* In the instant case, the Court finds that not only is there record evidence that counsel performed at an unusually high level of skill for attorneys charging the rates they did, but the Court also points out that additional credit must be given for having taken the case in the first place and *maintaining* the levels of dedication and quality for five years.

It is true that the quality of the work can be reflected in the number of the hours documented. But, to apply this principle in a vacuum or to hold that the quality of the work is reflected solely by the number of billable hours would, in effect, hold the law and its practitioners to standards and rules that are more fitting for economists. It would be unfair to equate the degree of skill held by counsel with the swiftness with which she or he could perform the work. To do so only encourages shodiness and haste, neither having a place in the legal world. The Court finds that based on its first hand knowledge of the quality

of Plaintiffs' counsels' work, and as evidenced by the record, that it represented unsurpassable quality.[12]

E. *The preclusion of other employment by the attorney due to the acceptance of the case.*

Ira Kurzban testified that this case caused him to turn down more lucrative work which would have benefited his law firm's coffers. The demands of this case also caused a serious crimp in the scholarly work generally undertaken by members of academia, such as Professors Stotzky and Winick.

F. *Awards in similar cases.*

The Eleventh Circuit recently affirmed the lower court's award of attorneys' fees in a related case of up to $125.00 per hour. *Haitian Refugee Center, Inc. v. Meese*, 791 F.2d 1489 (11th Cir. 1986). The Court notes that other decisions under the EAJA have awarded substantial fees, including awards based upon an hourly rate well in excess of $75.00 per hour, *see e.g., International Woodworkers of America, AFL/CIO Local 3-98 v. Donovan*, 769 F.2d 1388 (9th Cir. 1985); *LaDuke v. Nelson*, 762 F.2d 1318, 1332-33 (9th Cir. 1985).

G. *The customary fee.*

There is nothing in the record to contradict the figures given by counsel at the hearing and throughout the documentation that state their customary fees. Those attorneys in academia adequately testified as to what their fees are when working on outside projects.

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[12] For another Court's view concurring in the quality of the work performed by counsel, see *Haitian Refugee Center, Inc. v. Smith*, No. 79-2086 (S.D. Fla. May 24, 1984) (Order granting motion for fees, costs and expenses).

H. ***Whether the fee is fixed or contingent.***

The fees in this case were contingent. Had the Plaintiffs failed to attain the level of success they had, the attorneys involved would have had to sustain a loss of several million dollars—not an easy thing for even the most lucrative practitioners.

I. ***Time limitations imposed by the client or the circumstances.***

The time pressures of this case were constant. They were imposed, in large part, by the Court, and by the appellate courts, but were also due in part to the exigencies of the situation. The demands of this Court were overwhelming. In sum, the pace was rather hectic throughout the case.

J. ***The "undesirability" of the case.***

There was uncontroverted evidence at the hearing that lead counsel received several letters which contained the senders' distate with Mr. Kurzban's decision to participate in this case. Mr. Kurzban also lost some clients solely on account of his humanitarian stand in this case. The Court knows from first hand experience that this was not a popular case in some of the public's eye. The facts involved in this case brought out sincere and intense reactions from the community; some people were sympathetic with the Plaintiffs' plight, others were not shy about their lack of sympathy. Counsel, the Court and the Plaintiffs were exposed to the darker side of humanity on more than one occasion.

K. ***The nature and length of the professional relationship with the client.***

This factor is not relevant to the analysis in this case.

L. ***The Amount involved and the results obtained.***

This factor is crucial in this case, and provides the basis for a fully compensatory award. For, as the Supreme Court states in *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983): "[t]he result is what matters."

Plaintiffs clearly accomplished the primary goals of the lawsuit, which were to stop the mass exclusion hearings being held without counsel, to enforce the rule of law through the Administrative Procedure Act, to establish that race and national origin were impermissible factors in the enforcement of facially neutral statutes, and to obtain the class members' release from detention.

Finally, Plaintiffs' counsel took the government to task here, and succeeded at prohibiting the government from pursuing a course of action contrary to our laws and the forces of human dignity. This litigation reinforced the concept that parole decisions must be made without regard to race or national origin. *Jean v. Nelson,* ____ U.S. ____, 105 S.Ct. 2992, 2998 (1985).

V

ADDITIONAL FACTORS

A. Duplication

One of the most significant areas of concern expressed by the government involved its contention that counsel's efforts were duplicative and thus not compensable. The Court must disagree. It is not uncommon, nor should it be, that attorneys work in groups. In situations such as these, the court should:

> assess the possibility that reported hours include duplication by reviewing with particular care the number of lawyers present at hearings, depositions and other discovery proceedings, and by evaluating

> the roles played by the lawyers in the litigation generally. The Court can look to how many lawyers the other side utilized in similar situations as an indication of the effort required. Because utilizing more than one lawyer may be reasonable in some situations, such as during settlement conferences or during trial, *we decline to require an automatic reduction of reported hours to adjust for multiple representation or potential duplication. Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983) (emphasis added).

Counsel has represented to the Court, and the Court can find no reason to cast aspersions on the representation that counsel went through their time sheets countless times and purged them of any unnecessary duplication. Furthermore, it must be noted that lack of duplication is not the goal of efficient attorneys, avoidance of *unreasonable* duplication is the goal. Thus, an award will be reduced "only if the attorneys are *unreasonable* doing the *same* work." *Johnson v. University College of University of Alabama*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in the original).

In the instant case, multiple attorneys for the plaintiffs *and* the government participated at every stage of the litigation. This was not a one of two lawyer case. Each attorney had his or her own specialty or strength. After receiving a pleading, counsel had to review the document, confer with out-of-state counsel, plan their strategy, divide the work depending upon the nature of the task, conduct research, gather resources, and then meet as a group. Naturally, there was room for duplication. That fact, however, does not call for the conclusion that any duplication was unreasonable or that it taints the entire efforts.

The Court finds that the work of counsel was not unreasonably duplicative, and that "[a]ll attorneys who

contribute their services to a case may be awarded reasonable attorneys' fees." *Dowdell v. City of Apopka*, 698 F.2d 1181, 1188 (11th Cir. 1983) (citation omitted).

B. ***Unsuccessful claims: Equal Protection and Supreme Court Arguments***

As the Court stated in its December 6, 1985 Order, it found it necessary to reduce Plaintiffs' counsel's hours to reflect the fact that the government was substantially justified in the stance it took in response to the equal protection claim. Additionally, since mainly the equal protection claim was argued at the Supreme Court level, this Court suggested that it might be inappropriate to grant an award to counsel for its efforts at that level. However, throughout the proceedings at the district and appellate court levels, the government argued that nationality could be a factor in determining whether an alien is paroled. But in the Supreme Court, the government changed its position. It argued that the INS' rules and regulations prohibited the INS from making parole decisions based on nationality, but that under the Constitution, the INS was not prohibited from making such decisions. This Court finds that if the government had argued at the District Court and Eleventh Circuit levels the position it took in the Supreme Court, the constitutional claims would not have needed to be litigated. The government's change in position, therefore, indicates that to some degree it lacked substantial justification. *Haitian Refugee Center, Inc. v. Meese*, 791 F.2d 1489, 1497 (11th Cir. 1986) (Looking to the consistency of the government's position in determining substantial justification). Thus, some award is in order for counsel's efforts in the Supreme Court.

As for the equal protection claim, counsel has delineated those hours which can be solely attributable to that issue and has excised them from their total hours.

Counsel has also excised 60% of the time spent at the Supreme Court level. The Court finds both excisions are low, and thus rules that such time must be further reduced.

The Supreme Court observed in *Hensley*: "[t]here is no precise rule or formula for making this determination. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Hensley,* 461 U.S. at 436-37. The Court finds that both options suggested by the Supreme Court are applicable to the case at bar.

Specific hours spent on the equal protection issue have been identified and eliminated from the total. As previously mentioned, the Court finds that counsel's estimate of time spent on the equal protection claims is too low. By the Court's estimate, forty percent (40%) of counsel's time was spent on clearly non-equal protection matters. Perhaps sixty percent (60%) of counsel's time was spent on interrelated matters; an insignificant portion of that time was spent exclusively on equal protection issues. Of the 60% of the time spent on commingled material, the Court estimates that approximately 25% of that time was spent on equal protection issues. Thus, a reduction of 15% from the total number of hours is in order.

Those hours spent at the Supreme Court level shall be reduced by 75% rather than 60%. The Court will allow compensation for a fractional number of hours, because in light of the government's change in position and in light of the other issues briefed in the Supreme Court some award of fees is appropriate. The legal position of the government may have been substantially justified in some sense; the tactical position of the government, however, cannot claim the same status, and the Plaintiffs' counsel should not be penalized for the government's change in position concerning whether it could discriminate under existing statutes and regulations. *See, Haitian Refugee Center, Inc. v. Meese, supra* at 1497.

In sum, the Court finds that its reduction of the hours spent on the equal protection claims is more appropriate than counsel's estimates. Additionally, the Court has, *sua sponte,* reduced counsel's total hours to reflect a 75% reduction in those hours spent at the Supreme Court level.

C. *Documentation*

The last factor to consider is whether counsel adequately documented their time and hours so as to merit a fully compensatory award.

The government argues that attorneys are required to keep contemporaneous, almost perfect, records and time sheets or else suffer the consequences. Such a draconian approach is unnecessary and not supported by the case law. Rather, counsel must conscientiously keep records and time sheets which "should identify the general subject matter of his [her] time expenditures." *Hensley,* 461 U.S. at 424. There is no prohibition against restructuring time sheets where contemporaneous records are not kept. *Ramos v. Lamm,* 713 F.2d 546, 553 n.2 (10th Cir. 1983).

Even where there are discrepancies in time records, no reduction in the award is mandatory. Where an attorney's affidavit is not specific as to the nature of the work performed, but does provide the court with the general area of the subject matter, the court need not demand greater accuracy. *See Preston v. Heckler,* 596 F. Supp. 1158, 1161 (D. Alaska 1984).

In reviewing the affidavits, and having heard testimony on the matter, the Court finds it unnecessary to reduce, based on the government's allegation that counsel kept inadequate records, the total award or the number of hours for which counsel seeks compensation.

VI

HOURLY RATE

Under the EAJA, the district court may adjust the hourly rate upward from $75.00 if special factors are present. The Act states in pertinent part: "attorneys fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A).[13]

The Court finds that there are special factors warranting an upward adjustment of the fee.

A. *Increase in the cost of living*

Unlike many cases, the work done has been spread fairly evenly over the past five years, perhaps with the exception of 1986. Because of the inherently sporadic nature of the judicial system, work had to be done in spurts (to

[13] Recent amendments to the EAJA make the Act permanent and contain clarifying provisions that in virtually every respect broaden and strengthen the Act's application. Beside expanding eligibility and making express the Act's application to a wide range of proceedings, the amendments specifically adopt a broad meaning of "position of the United States" to include agency action as well as the government's litigating position and in other respects reaffirms that the statutory language is to be interpreted broadly in favor of private parties. H.R. Rep. NO. 19-120, 99th Cong., 1st Sess. at 8-9, 19 (1985).

Throughout the legislative history, the purposes of the Act—"to expand the liability of the United for attorneys' fees and other expenses" and "to increase accessibility to justice" are emphasized. The Committee decries the fact that awards during the initial three-year period of the Act were "dramatically less" than predicted. *Id.* at 4, 8-9. These amendments and their legislative history make it clear that the Act is to be applied more forcefully to encourage private parties to pursue litigation against the government.

prepare for oral argument, briefing schedules, etc.). "By specifying inflation as a 'special factor', Congress indicated its concern that lawyers receiving fees at different times obtain equivalent value." *Action on Smoking and Health,* 724 F.2d 211, 219. Thus, there is clear instruction from the language of the Act that counsel should have its award reflect an increase in the cost of living which results from a long delay in payment. *Copeland v. Marshall,* 641 F.2d 880, 893 (D.C. Cir. 1980) (*en banc*) (citation omitted).

B. *Limited availability of counsel*

There was substantial testimony that the Plaintiffs' counsel encountered a shameful amount of disinterest from the local legal community when counsel sought to gather forces for this lawsuit.[14]

As mentioned earlier, this was a complex case. Counsel had to have knowledge of many interwoven and discrete areas of the law. Additionally, any attorney who did become involved in this case had to do so at her or his own expense, since the possibility of being reimbursed for he work was remote. Finally, the Court heard undisputed testimony that despite counsel's best efforts, they were unable to attract local counsel that had the combination of knowledge, financial capability, and dedication to take on the responsibilities that this case entailed.

Based on the foregoing factors, this Court finds that an hourly fee award above $75.00 per hour is appropriate for

[14] As the Eleventh Circuit observed, "[e]fforts had been made by the INS to secure representation for the Haitians, especially *pro bono,* in the Miami area. The response it received is an ugly reflection of the commitment with which the bar meets its responsibility to make legal services available to the disadvantaged." *Haitian Refugee Center, Inc. v. Smith,* 676 F.2d 1023, 1031 n.16 (5th Cir. 1982).

Plaintiffs' counsel. The Court finds that the following schedule reflects the number of hours reasonable expended and the appropriate hourly rate for each attorney or law firm:

Attorney	Hours	EP/S.CT	Total	Rate	Lodestar
Kurzban	2,172.5	335.21 (S.Ct) 325.88 (E.P.)	1511.41	$125.00	$188,926.25
Stotzky	1,194.85	345.0 (S.Ct) 179.23 (E.P.)	670.62	$125.00	$ 83,827.50
Winick	1,476.75	191.85 (S.Ct) 221.51 (S.Ct)	1063.39	$125.00	$132,923.75
Weisz	628.2	-0-	628.2	$ 75.00	$ 47,115.00
Hall	97.80	-0-	97.80	$100.00	$ 9,780.00
Rosen	620.00	57.75 (S.Ct)	562.25	$100.00[15]	$ 56,225.00
Wald, Harkrader	62.75	-0-	62.75	$75-85.00	$ 4,973.00
Fried (atty)	3,821.00	843.0 (S.Ct) 573.1 (E.P.)	204.9	$50-175.0	$270,551.25
(para)	1,188.10	232.58 (S.Ct)	955.52	$ 40.00	$ 38,220.80

VII

ENHANCEMENT OF THE FEE AWARD

The Supreme Court has repeatedly recognized that in certain circumstances an enhancement of the fee award is appropriate. *Pennsylvania v. Delaware Valley Citizens' Council,* 106 S.Ct. 3088, 3898 (1986); *Blum v. Stenson,* 465 U.S. 886, 899 (1984); *Hensley v. Eckerhard,* 461 U.S. 424, 435 (1983). The Court is aware that such a conclusion is proper only in certain rare and exceptional cases and must be supported by specific evidence on the record in detailed findings. *Pennsylvania v. Delaware Valley Citizens' Council, supra,* at 3098.

[15] Although Mr. Rosen requested $125.00 an hour, this Court is of the opinion that, when Mr. Rosen's role in this case is compared to that of lead counsel, an hourly rate of $100.00 is appropriate.

The Court believes that this case presents the rare and exceptional circumstances warranting an enhancement of the fee award. This conclusion is based on the Court's finding that the following factors, none of which were previously considered by the Court in its assessment of the fee award under the Equal Access to Justice Act, exist.

A. *Pro Bono Publico*

A special factor meriting enhancement of the fee award that does not arise in most Equal Access to Justice Act cases is the Pro Bono Publico nature of this case and of the Plaintiffs' attorneys' motivation in brining it. This was not a case merely to vindicate the pecuniary interests of the Plaintiffs; rather, it was to free them from unlawful detention and to vindicate their rights to fair process and equal treatment. Plaintiffs' counsel acted in an exemplary fashion and are to be commended for their outstanding efforts in the public interest. Moreover, their exemplary conduct has had a salutory effect on the Bar.

The *pro bono publico* bar in this community and throughout the nation has been shaken to its roots; a more conscientious attitude toward the plight of the indigent and unpopular has been taken in recent years due to this case, and the nation-wide efforts to obtain *pro bono* counsel in the context of the case. Indeed, as a direct result of this litigation and counsels' effort, the largest *pro bono* program in the history of the United States was established. Helton, *The Most Ambitious Pro Bono Ever Attempted,* 12 Hum.Rts. 19 (1984). Surely this "result" is one which cannot be measured in monetary terms, but must be measured nonetheless.

B. *The Vindication of Public Rights*

Plaintiffs' counsel functioned in this litigation as private attorney generals seeking to vindicate public rights. In-

deed, they frequently characterized their aims in the lawsuit as vindicating the rule of law in the context of immigration practice. As previously indicated, this was not a case, like perhaps most are under the Equal Access to Justice Act, to vindicate the purely precuniary interests or other private rights of their clients. Rather, it sought to put an end to illegal immigration practices and to establish a consistent policy for all aliens facing detention by the Immigration Service. As a direct result of counsels' actions, the public interest has been vindicated through the government's publication of its new detention policies. Actions of this kind seeking to vindicate such important public interests are especially to be commended, justifying enhancement of the fee award.

C. *The Emotional Hardship to Plaintiffs' Counsel*

The members of Plaintiffs' class spent many months in unlawful detention, suffering great hardship and deprivation. Many sustained psychological problems. Several committed suicide, including one of the named class representatives. The human stakes were high. Moreover, this was a nationwide class action involving members of Plaintiffs class dispersed to detention facilities throughout the country. These factors placed special pressures on counsel that were exceptional. The Court is not unaware of the tremendous emotional and psychological pressure that this situation placed upon Plaintiffs' counsel in virtually all of their activities in this lawsuit. This special circumstance also merits enhancement of the fee award.

D. *The Government's Litigious Position*

The government took an unusually unwaivering and litigious position throughout the litigation. Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiffs' contentions at every turn. From pre-trial discovery, through trial and successive appeals, the government moved for stays of Court Order, forced repeated applications for emergency relief, put Plaintiffs in a posture requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as law, each and every important issue asserted by Plaintiffs. The government even opposed Plaintiffs' efforts to seek summary judgment on the A.P.A. issue and thereby unnecessarily prolonged the litigation. The Court notes that even the EAJA recognizes the independent importance of placing sanctions against overly litigious conduct. 28 U.S.C. § 2412(d)(1)(C). Although the government's conduct was surely motivated by good faith, their overly litigious posture unnecessarily prolonged this litigation.

As a result of the four factors the Court concludes that an enhancement of the attorneys' fee award in the amount of an additional 15% is warranted. *Each* of these factors taken *alone* would, in the Court's view, warrant such a 15% enhancement.

Even if a question is raised as to the permissibility of an enhancement under the E.A.J.A., the above factors should be viewed, alternatively, as additional "special factors" justifying an increase in the hourly rates requested and already awarded above, 28 U.S.C. § 2412(d)(2)(A).

VIII

CONCLUSION ON ATTORNEY'S FEES

In conclusion, the Court finds that a fifteen percent (15%) enhancement of the award is proper after consideration of all special factors.

In light of the analysis above concerning the award and the 15% enhancement thereof, the Court finds that the following chart represents the correct numbers and tabulations which constitute a fair and just attorneys' fees award in this case:

Attorney	Award	15% Enhancement	Total Fee Award
Kurzban	$188,926.25	$28,338.94	$217,265.19
Stotzky	83,827.50	12,574.13	96,401.63
Winick	132,923.75	19,938.56	152,862.31
Weisz	47,115.00	7,067.25	54,182.25
Hall	9,780.00	1,467.00	11,247.00
Rosen	56,225.00	8,433.75	64,658.75
Wald	4,973.00	-0-[16]	4,973.00
Fried, (atty)	270,551.25	40,582.69	311,133.94
Frank (para)	38,220.80	not applicable	38,220.80
			$950,944.87

IX

COSTS

The Plaintiffs' counsel requests reimbursement for costs and expenses in the following amounts:

Attorney	§ 1920	EAJA	Sup.Ct.	Total less Sup.Ct.
HRC, Inc.	$47,204.82	$39,081.25	$ 9,059.31	$ 77,226.76
Fried	$39,951.34	$56,374.26	$13,964.34	$ 82,361.26
Winick	-0-	$ 1,372.90	$ 1,206.01	$ 166.89
Wald	-0-	$ 499.82	-0-	$ 499.82
				$160,254.73

There is clearly a lack of consistency among the courts when it comes to determining which items are recoverable

[16] Because the attorneys from Wald, Harkrader were involved only in the preliminary stages of this litigation, the enhancement factors are not applicable to their efforts.

as costs or expenses under 28 U.S.C. § 1920 or under 28 U.S.C. § 2412(d)(2)(A) respectively.

Section 1920 of Title 28 states:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursement for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

The above list is not exhaustive, however, of which items courts recognize as recoverable in cases brought under the EAJA.

That is so because the EAJA states in pertinent part in Section 2412(d)(1)(A):

For the purpose of this subsection–

> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees.

Thus, the language of the EAJA illustrates that while the "costs" incurred by the party may be recoverable only

under § 1920, "expenses" may be recoverable under § 2412(d)(2)(A). The clear language of the latter section lists certain expenses as examples, not limitations. *Hoopa Valley Tribe,* 569 F. Supp. at 947.

Courts have interpreted the above statutory sections inconsistently. For example, in *Action on Smoking and Health v. C.A.B.,* 724 F.2d 211, 224 (D.C. Cir. 1984), the court did not allow compensation as expenses under the EAJA for taxi fares, filing, wrapping postage, but did allow compensation for photocopying costs, citing to *NAACP v. Donovan,* 554 F. Supp. 715, 719 (D. D.C. 1982).

Another court allowed prevailing plaintiffs to recover their copying costs, but arbitrarily reduced the requested amount of 25¢ per page to 10¢. *Wolfe v. Wolfe,* 570 F. Supp. 826, 826 (D.S.C. 1983).

In the case of *American Academy of Pediatrics v. Heckler,* 580 F. Supp. 436, 440 (D.D.C. 1984), the court went a step further. There, the court disallowed compensation under the EAJA for research costs an overhead, as well as transportation and filing. Furthermore, the court held that paralegal and law clerk time was only compensable at the actual cost of their salaries paid out by the law firm. This court strongly disagrees with that position.

In a decision handed down the same day as *American Academy of Pediatrics,* the same court held that "to award 'fees' for law clerk and paralegal time at hourly charges billed to clients would, in effect, be to compensate those firms for both overhead and profit." *Ashton v. Pierce,* 580 F. Supp. 440, 443 (D.D.C. 1984). Yet, the court did permit reimbursement for the salaries paid to the paralegals and law clerks. Insight into the court's somewhat jaundiced view of the EAJA is provided by the following passage:

> It is now accepted that lawyers who prevail in these cases may be entitled to be paid a reasonable fee for

> services which are still somewhat euphemistically referred to as "*pro bono*". Attorneys hope to receive and usually request out-of-pocket expenses and a handsome profit. Often the government is asked to pay for the "learning experiences" of coveys of junior associates and other assistants assigned to a case to break the tedium of everyday practice.

580 F. Supp. at 444.

This Court finds the above harangue to be simply inapplicable to the instant case. If the court in *Ashton* had been privy to the workings of this case, it would have been crystal clear that any abuses inherent in our legal system are seldom found in the fee applications of dedicated lawyers who provided a vital service to our citizenry by offering, *without compensation,* to protect the rights of all persons. Congress perceived a need to offer the possibility of compensation to attorneys who are willing to take the government to task; but *only* when the government acts without substantial justification are the public coffers opened.

With regard to the compensability of paralegal and law clerk time, the Court finds that the analysis set forth in *Hoopa Valley v. Watt,* 569 F. Supp. 943, 947 (N.D. Cal. 1983) to be more pursuasive. There, the court noted:

> [T]he lower rates sought for law clerk services are reasonable and should be compensated as part of attorney's fees because the use of such services is a cost-efficient component of the modern practice of law.

Although law clerk and paralegal services constitute a part of attorney's fees, there is no basis for applying any multiplier to the figures. Thus, the Court will compensate Plaintiffs' counsel for the work performed by their paralegals and law clerks pursuant to the rate schedule provided by counsel.

The Court agrees with the Plaintiffs' position that virtually all expenses and costs reasonably incurred are recoverable under either 28 U.S.C. § 1920 or the EAJA. This position is consistent with the ameriolative purposes of the EAJA and the appropriately broad view of costs taken by the Eleventh Circuit in the civil rights context. *Dowdell v. City of Apopka, Florida,* 698 F.2d 1181, 1192 (11th Cir. 1983). ["with the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988."] The court allowed reimbursement in *Dowdell* for travel, telephone and postage, and cited with approval several cases which permitted recovery for additional costs and expenses, such as mileage, photocopying, food and lodging.

This Circuit is not alone in its position that costs and expenses are not limited to docket fees and the like. Rather, the Ninth Circuit recently permitted an award for costs of telephone calls, postage, air courier and attorney travel expenses on the ground that similar costs are routinely awarded under other fee statutes, and thus should be awarded under the EAJA. *International Woodworkers of America, AFL-CIO, Local 3098 v. Donovan,* 769 F.2d 1388 (9th Cir. 1985). *See also Hoopa Valley Tribe v. Watt,* 569 F. Supp. 943 (N.D. Cal. 1983) (telephone and travel costs awardable as part of expenses since they would normally be billed to client).

As for the witness and expert witness fees, the Court is satisfied that the testimony provided by Messrs. Gitlow, Bernsen and Gordon at trial was necessary, as was the testimony of Messrs. Mailman and Rogow at the hearing on attorney's fees.

With regard to the claims for computer time, the Court finds that Lexis charges are dissimilar from typing in that

Lexis fees are paid to entities outside the law firm and also generally charged to the client. Computer charges should be allowable as expenses and this Court will so allow compensation for those expenses.

Finally, the Court opines that the record keeping practices of the claimants has been sufficiently accurate so that no deduction therefore is necessary. The Court also notes at this time that the HRC, Inc., being an organization that has neither the facilities nor financial strength to employ a state of the art billing system, did a good job of record keeping in light of those limitations.

SOME DEDUCTIONS ARE NECESSARY

The Court can find no way to justify awarding compensation for secretarial overtime as either costs or expenses. Secretarial work is part of the everyday activity of a law firm which constitutes its overhead. Secretarial salaries are paid to employees of the firm, and thus are not similar to those monies paid to persons outside the firm such as process servers or witnesses. Furthermore, their salaries cannot be equated with costs, such as filing fees, or expenses such as postage or computer charges, which are similarly paid to entities outside of the law firm. Attorneys cannot be compensated for normal overhead expenses.

The Court finds no authority to support the inclusion of hours and subsequent charges related to secretarial overtime in the award. The chart outlining the costs and expenses awardable is thus amended to reflect the deduction as follows:

Attorney	§ 1920	EAJA	Overtime	S.Ct.	Total
HRC	$47,204.82	$39,081.25	$ 633.40	$ 9,059.31	$ 76,563.36
Fried	$39,951.34	$56,374.26	$14,752.60	$13,964.34	$ 74,939.26[17]

[17] This figure adds in the expert witness fee and costs and copying which add up to $7,330.60, said amount not being included in the

Attorney	§ 1920	EAJA	Overtime	S.Ct.	Total
Winick	-0-	$ 1,372.90	-0-	$ 1,206.01	$ 166.89
Wald	-0-	$ 499.82	-0-	-0-	$ 499.82
					$152,169.33

XI

CONCLUSION ON COSTS AND EXPENSES

In conclusion, the Court finds that the summary of costs and expenses framed above accurately reflects what the law of this Circuit requires. In order to give true vitality to the EAJA and its corrolating statutes, courts must not be parsimonious solely because the monies paid are removed from the public coffers. On the contrary, the law requires courts not to consider that prevailing plaintiffs are paid from public funds. *Copeland v. Marshall,* 641 F.2d 880, 894-96 (D.C. Cir. 1980).

XII

FEES FOR FEES

Under a recent case, the Eleventh Circuit held:

> [I]n this case of first impression for the Eleventh Circuit, we apply the general intent of the Act and decline to hold that this court may award fees for fees only if the government's position in the fees litigation was not substantially justified. *Haitian Refugee Center, Inc. v. Meese,* 791 F.2d 1489, 1500 (11th Cir. 1986).

Following the decision in *Haitian Refugee Center, Inc. v. Meese, supra,* Plaintiffs' counsel submitted affidavits to support their request for attorneys' fees, costs and ex-

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Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and which the Court includes at this time.

penses for litigating the fee issue to date. The amounts that Plaintiffs' counsel have requested are as follows:

Attorneys	Fees	Costs	Expenses
Ira J. Kurzban	$13,125.00	$ 2,407.31	$301.36
Bruce J. Winick	$ 1,687.50		
Irwin P. Stotzky	$ 2,562.50		
Vera Weisz	$ 2,500.00	$ 358.62	
Fried, Frank (atty)	$33,993.75		
(para)	$24,110.00	$20,526.91	(Cost and expenses)

None of the fees, costs or expenses have been challenged by the government by way of motion, counter-affidavit or request for evidentiary hearing. As the government has voiced no objection to these fees, costs and expenses and based upon the Court's previous findings under *Johnson* and the other factors enumerated above, which it incorporates herein, the Court believes these requests are reasonable.

XIII

POST JUDGMENT INTEREST

As for post-judgment interest, the EAJA was amended August 5, 1985 to included the following paragraph:

> (f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be determined under Section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate or affirmance.

This statutory amendment overrules this circuit's previous ruling in *Arvin v. United States,* 742 F.2d 1301 (11th Cir. 1984) which held that the district court was without authority to award interest on EAJA attorney's fees awards. The amendment is selfexplanatory and requires no further comment by the Court.

XIV

CONCLUSION

It is within the Court's discretion to ascertain what constitutes a reasonable award of attorney's fees, costs and expenses under the Equal Access to Justice Act. The Court must make sure that the Act's fees provisions are not used to create "windfalls" to counsel. But, at the same time, counsel must be fairly compensated for their efforts. The findings and conclusions above illustrate what this Court believes is a fair award

Based on the above and foregoing, it is hereby

ORDERED AND ADJUDGED that attorneys fees, costs and expenses are awarded to counsel as follows:

IRA KURZBAN is awarded $217,265.19 in attorney's fees;

IRWIN STOTZKY is awarded $96,401.63 in attorney's fees;

BRUCE WINICK is awarded $152,862.31 in attorney's fees and $166.89 in costs;

VERA WEISZ is awarded $54,$182.25 in attorney's fees;

CHRISTOPHER KEITH HALL is awarded $11,247.00 in attorney's fees;

MICHAEL ROSEN is awarded $65,658.75 in attorney's fees;

WALD HARKRADER is awarded $4,973.00 in attorneys' fees and $499.82 in costs and expenses;

FRIED, FRANK is awarded $311,133.94 in attorneys' fees, $38,220.80 in paralegal and law clerk fees and $75,939.26 in costs and expenses; and

HAITIAN REFUGEE CENTER, INC. is awarded $76,563.36 in costs and expenses.

It is further ORDERED AND ADJUDGED, that attorneys' fees, costs and expenses for the fee litigation are awarded to counsel as follows:

IRA KURZBAN is awarded $13,145.00 in attorney's fees, $2,407.31 in costs and $301.36 in expenses;

BRUCE J. WINICK is awarded $1,687.50 in attorney's fees;

IRWIN P. STOTZKY is awarded $2,562.50 in attorney's fees;

VERA WEISZ is awarded $2,500.00 in attorney's fees and $358.62 in costs and expenses;

FRIED, FRANK, HARRIS and SHRIVER is awarded $58,103.75 in attorney's fees and paralegal fees and $20,536.91 in costs and expenses.

DONE AND ORDERED in Chambers, at Miami, Florida this 1 day of Oct. 1986.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
United States District Judge

cc: Ira Kurzban, Esquire
Irwin Stotsky, Esquire
Bruce Winick, Esquire
Michael Rosen, Esquire
Vera Weisz, Esquire
Niels Frenzen, Esquire
Robert Juceam, Esquire
Wald, Harkrader
Michael Lindemann, Esquire
Leon Kellner, U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260-Civ-SPELLMAN

LUCIEN LOUIS, ET AL., PLAINTIFFS

vs.

ALAN NELSON, ET AL., DEFENDANTS

ORDER CONCERNING PLAINTIFFS' ENTITLEMENT TO ATTORNEYS' FEES, COSTS AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

THIS CAUSE came before the Court on the plaintiffs' Motion for Attorneys' Fees, Costs, and Expenses under the Equal Access to Justice Act. For the reasons detailed below, this Court finds that the plaintiffs are entitled to an award of attorneys' fees, costs, and expenses allocable to their efforts in litigating their claims before this Court and the United States Court of Appeals for the Eleventh Circuit. By separate Order, this Court shall schedule a hearing to determine the amount that shall be awarded.

The Equal Access to Justice Act ("EAJA") provides that:

> a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

Thus, in order to grant an award of attorneys' fees, this Court must find that the plaintiffs were the prevailing parties within the meaning of the Act, that the government's

position was not substantially justified and that there are no other special circumstances that would make an award unjust. All of the requirements for an award of attorneys' fees have been met here.

THE PLAINTIFFS WERE THE 'PREVAILING PARTIES'

The Supreme Court has observed that "plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in the litigation achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhardt*, ____ U.S. ____, 103 S.Ct. 1933, 1939 (1983), (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978)). There can be no doubt in this case that the plaintiffs succeeded on a significant issue.

This case began in response to implementation by the INS of a new policy of accelerated exclusion proceedings and detention without parole of all Haitian refugees.[1] In essence, the litigation had two primary goals. First, the plaintiffs sought to stop the mass exclusion hearings which were being held without counsel.[2] And second, plaintiffs sought to obtain the release from detention of class members pending the determination of their political asylum applications, thereby restoring to full force and

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[1] The background to this litigation is discussed in this Court's opinion, *Louis v. Nelson*, 544 F.Supp. 973, 978-981 (S.D. Fla. 1982), and in the Eleventh Circuit's panel opinion, *Jean v. Nelson*, 711 F.2d 1455, 1464-1474 (11th Cir. 1983).

[2] Indeed, shortly after this case was filed the government conceded that the exclusion orders entered at such hearings were invalid and therefore said orders were vacated. Thus, plaintiffs were the prevailing party on this aspect of the litigation and, in light of the government's action, its position was not substantially justified.

effect the prior policy of parole pending individual exclusion proceedings.[3]

After a lengthy trial, this Court held that the new detention policy was adopted in violation of the Administrative Procedure Act ("APA") and the plaintiffs' continued incarceration pursuant to this policy was unlawful. *Louis v. Nelson*, 544 F.Supp. 973, 993-97 (S.D.Fla. 1982). Ten days later, this Court declared the new detention policy "null and void", and ordered the release of class members "forthwith" pursuant to a carefully drafted release plan. *Louis v. Nelson*, 544 F.Supp. 1004, 1006-07 (S.D. Fla. 1982). Thus, the plaintiffs effectively obtained both of the goals they set out to achieve. As a direct result of this litigation, the defendants stopped the accelerated mass exclusion hearings and class members were released from in-

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[3] The complaint, filed on June 16, 1981, asserted seven causes of action. Count I challenged the commencement of preliminary interviews for Haitian refugees without the presence of counsel or notice of the right to counsel; Count II challenged the legality of the new detention policy, which was not promulgated pursuant to the rule-making requirements of the APA; Count III challenged the failure to advise class members of their procedural rights at exclusion hearings; Count IV challenged the denial of access to counsel; Count V challenged the denial of public exclusion hearings; Count VI challenged the denial of the right to apply for political asylum; and Count VII challenged the lawfulness of the new Haitian program in its entirety under the equal protection clause. In a Memorandum Opinion and Order dated February 24, 1982, this Court dismissed Counts I, III, V, and VI in their entirety and Counts IV and VII in part. It retained jurisdiction over Count II, Count IV insofar as it alleged that Haitians in detention had first amendment rights of access to counsel and that the Haitian Refugee Center had a claim of access to those persons in detention; and Count VII insofar as it alleged that the detention policy was applied in a discriminatory fashion. *Louis v. Meissner*, 532 F. Supp. 881 (S.D. Fla. 1982).

definite incarceration.[4] These results were affirmed by the Eleventh Circuit panel. *See Jean v. Nelson*, 711 F.2d 1455, 1510 n.63 (11th Cir. 1983). The *en banc* court dismissed the defendant's appeal of this Court's decision on the APA issue, thus leaving the results plaintiffs obtained undisturbed. *See Jean v. Nelson*, 727 F.2d 957, 962 (11th Cir. 1984), *aff'd in part*, 105 S.Ct. 2992 (1985).[5]

The fact that plaintiffs did not "prevail" on their claim that the new policy violated their fifth amendment rights to equal protection does not mean that they cannot be considered "prevailing parties" for attorneys' fees purposes. Plaintiffs need not prevail on every issue to be considered

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[4] The relief obtained by the plaintiffs mooted many of the issues raised in the complaint. Plaintiffs were released from detention and indirectly obtained counsel or notice of the right to counsel, thereby ensuring that class members would have notice of their procedural rights at exclusion hearings (Count III), including the right to apply for political asylum (Count VI). As a result of this lawsuit, defendants stopped their practice of preventing lawyers from contacting Haitians at closed exclusion hearings (Count I). With the release of class members, plaintiffs have had access to counsel and counsel have had access to class members (Count IV). Also as a direct result of this litigation, the INS promulgated new parole regulations which are facially neutral and which require parole decisions to be made without regard to race or nationality. *See* 8 CFR § 212.5 (1985).

[5] The Eleventh Circuit panel that originally heard this matter found that the defendants discriminated against the plaintiff class in the enforcement of the new detention policy and that plaintiffs were therefore denied equal protection. *Jean v. Nelson*, 711 F.2d at 1509. The Eleventh Circuit, sitting *en banc*, however, held that excludable aliens have no constitutional rights with respect to their applications for admission, asylum, or parole. *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc). The Supreme Court held that the *en banc* court should not have reached the constitutional issue because under the statutes and regulations now in effect, parole decisions must be made without regard to race or national origin. *Jean v. Nelson*, 105 S.Ct. at 2998.

a prevailing party. For purposes of attorneys' fees, "[t]he result is what matters.' *Hensley*, 103 S.Ct. at 1940. Plaintiffs merely pursued alternative litigation theories in attacking the INS' new detention policy.[6]

THE GOVERNMENT'S POSITION ON THE APA ISSUE WAS NOT SUBSTANTIALLY JUSTIFIED

The government has the burden of proving that its position "had a reasonable basis both in law and fact." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6, U.S. Code Cong. & Admin. News 1098, p. 4989; S. Rep. No. 253, 96th Cong., 1st Sess. 6 (1979). The Eleventh Circuit has emphasized that the legislative history of the Equal Access to Justice Act requires "the government to make a *strong showing* to demonstrate that its action was reasonable." *S. & H. Riggers & Erectors, Inc. v. O.S.H.R.C.*, 672 F.2d 426, 430 (11th Cir. 1982) (citation omitted) (emphasis supplied by the court). *See also Environmental Defense Fund, Inv. v. Watt*, 722 F.2d 1081, 1085 (2d Cir. 1983). The government has not and, indeed, cannot make the requisite showing here.

On August 5, 1985, the Equal Access to Justice Act was amended with regard to the "position of the United States" when determining substantial justification. Under the amendment, which applies to pending cases, the government must not only show substantial justification with regard to its litigating position, but also "the action or failure to act by the agency upon which the civil action is based." Pub.L.No. 99-80, ¶ 2(c)(2)(d). Under the facts of

[6] This Court was well aware that after it found that the new policy was violative of the APA that "[t]echnically . . . [it] need not go further in order to resolve plaintiffs' other claims for relief." *Louis*, F.Supp. at 997. However, the Court chose to review the equal protection claim in the interests of "judicial economy and fairness." *Id.* at 997-98.

this case, the distinction makes little difference. *See Ashburn v. United States*, 740 F.2d 848 n.1 (11th Cir. 1984) (noting that in a typical case there is no real difference between action of agency and litigation position). The INS make a determination that its new detention policy did not have to comply with the rulemaking requirements of the Administrative Procedure Act. When this was challenged in Court, attorneys from the United States Attorney's Office and the Department of Justice argued that the INS was correct. The position taken by the INS and the position taken by the government attorneys in defending the INS's actions were essentially the same. And these positions were unreasonable.

The INS was well aware prior to this litigation that the courts in this jurisdiction had consistently rejected INS' claim that the APA did not apply to changes of substantive policy regarding Haitian refugees. *National Council of Churches v. Egan*, No. 79-2959-Civ-HOEVELER, Slip op. at 3 (S.D. Fla. Aug. 3, 1979) (preliminary injunction entered, not appealed); *Sannon v. United States*, 460 F.Supp. 458, 466-67 (S.D. Fla. 1978), *remanded to be vacated as moot*, 631 F.2d 104 (S.D. Fla. 1978).

Indeed as early as March 10, 1981, the INS Acting General Counsel wrote a memorandum summarizing the legal requirements applicable to the defendants' detention policy and mass exclusion hearings. Citing the *Sannon* case as authority, he advised the INS that "[a]ny change in regulations which takes rights or privileges away from aliens will most likely require a 60-day notice and comment period, and a 30-day delayed effective date. . ." Legal Memorandum by INS Acting General Counsel Paul Schmidt, Px94. But even though the INS was apparently aware that it needed to comply with the APA, the defendants intentionally refused to do so. As this Court found:

> They admitted to the Court that they made a conscious decision not to promulgate a rule pursuant to

> the Administrative Procedure Act. The evidence shows that they never seriously undertook the difficult task of drafting a set of guidelines concerning which aliens would be placed in detention. Instead, INS issued general instructions to its field officers to start detaining excludable aliens who do not establish a prima facie claim for admission.

Louis v. Nelson, 544 F.Supp. at 981.

In light of prior precedent and the advice of counsel, INS' refusal to comply with the APA was not reasonable; nor was the position of the United States Attorney's Office in defending these actions by claiming that the change in policy was not a rule subject to the rulemaking requirements of the APA. This Court rejected the government's claims in its opinion, finding that the change in policy was "clearly" a rule subject to the rulemaking requirements of the APA. *Louis v. Nelson*, 544 F.Supp. at 997. The Eleventh Circuit found that defendants were not likely to succeed on this issue and denied their request for a stay. *Jean v. Nelson*, 683 F.2d 1311, 1312 (11th Cir. 1982). After hearing the case, the Eleventh Circuit panel completely rejected the government's arguments that the new policy was not a rule to which the APA rulemaking requirements applied and affirmed the decision of this Court. *Jean v. Nelson*, 711 F.2d at 1483.

The government's factual position in this litigation was also without merit. The defendants repeatedly denied that there was a new detention policy for Haitians, claiming that the district directors still had complete discretionary authority to parole individuals or, alternatively, that the directors were merely enforcing the statute. *See also Jean v. Nelson*, 711 F.2d at 1469-1470 (discussing conflicting testimony at trial by Administration officials as to whether there was a policy change). It was only well into the litigation that the defendants admitted what had been obvious—that there was a detention policy and that they had

instituted this policy without complying with rulemaking procedures. Since the plaintiffs had consistently maintained that there was a detention policy, the defendants' unreasonable factual position unnecessarily prolonged the litigation of this matter.

Finally, the defendants have not demonstrated any special circumstances which would make an award unjust. Indeed, considering the extraordinary efforts of plaintiffs' counsel and the excellent results they achieved, it would be unjust to deny an award of attorneys' fees.

THE PROPER STANDARD

The issue of attorneys' fees in this case is complicated, however, by the fact that the government's legal position—that the INS's action did not violate the equal protection guarantee of the fifth amendment—must be considered reasonable in light of the fact that the Eleventh Circuit, sitting *en banc,* actually agreed with the government on this point. Even though the Supreme Court found that the circuit court should not have reached the constitutional issue, the government was certainly "justified" for EAJA purposes in defending against the claim that the INS' actions violated the equal protection guarantee.

In *Hensley,* the Supreme Court emphasized that counsel should not be penalized for pursuing, in good faith, alternative claims for relief.[7] Although the Court observed in a

[7] According to the Court:

> In [certain] cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will en-

footnote that the standard it set forth is "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party,' " 104. S.Ct. at 1939 n.7, this Court is of the opinion that these principles must be modified to some degree for fee awards under the Equal Access to Justice Act. Unlike the Civil Rights Attorney's Fees Awards Act, which allows prevailing parties in suits brought under specified civil rights statutes to recover "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988, the Equal Access to Justice Act mandates the award of attorneys' fees *unless* "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Thus, under the Equal Access to Justice Act, a prevailing party in a suit against the government cannot be awarded fees when the government's position was reasonable.

In *Matthews v. United States,* 713 F.2d 677 (11th Cir. 1983), the Eleventh Circuit articulated the standard to be used in an Equal Access to Justice Act claim when a plaintiff prevails in some but not all its claims against the United States. Adopting the approach of the Third Circuit in *Goldhaber v. Foley,* 698 F.2d 193, 197 (3d Cir. 1983), the Court noted that neither the terms of the Act nor its legislative history addressed this situation. It therefore

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> compass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not sufficient reason for reducing a fee. The result is what matters.

Hensley v. Eckerhart, 103 S.Ct. at 1940 (citation and footnote omitted).

began its analysis by looking to the underlying purpose of the Equal Access to Justice Act. If found:

> The governing principle of the Act is that the "United States should pay those expenses which are incurred when the government presses unreasonable positions during litigation." The central purpose of the Act is "to eliminate any barrier to litigation challenging unreasonable government conduct presented by the specter of attorney's fees. . . . Because the Equal Access to Justice Act contemplates deterring only unreasonable positions," it would contravene the purposes of the Act to require the government to bear the expense of defending even its reasonable positions. Following the Third Circuit, we adopt the position "that the United States is only responsible for that portion of the expenses attributable to its unjustified positions."

713 F.2d at 683-684 (citations omitted).

Thus, when reviewing a claim for attorneys' fees under the EAJA, the Court must take into account not only the results obtained but also the reasonableness of the government's positions on each of the disputed claims. As discussed above, the Court finds that the government was not substantially justified in its position on the APA claim. By prevailing on this claim, the plaintiffs obtained virtually all the relief they requested, a factor that should weigh heavily in the determination of the fee award. On the other hand, because the government did not act unreasonably in defending against the claim that the INS' actions violated the equal protection guarantee of the fifth amendment, any fee award must also be reduced accordingly.

The Supreme Court observed in *Hensley* that when a lawsuit involves a "common core of facts" or "related legal theories" as this case did, "[m]uch of counsel's time will be

devoted generally to the litigation as a whole, making it difficult to divide hours expended on a claim by claim basis." 103 S.Ct. at 1940. This observation is particularly apt here. Determining the amount of time spent on each claim would be particularly onerous in this case, given the interrelated nature of the facts and theories and the number of attorneys involved in the various aspects of the litigation. The Court notes that there was considerable overlap between the APA and the equal protection claim. The preliminary issues were essentially the same. For example, for both claims plaintiffs had to establish that they had standing, that this Court had subject matter jurisdiction, that they were entitled to proceed as a class, that a "final" INS order was not required, that they had exhausted administrative remedies, that the detention policy was not committed to agency discretion and that the political question doctrine did not apply.

Even at trial, the presentation of the equal protection issue overlapped to some degree with the APA claim. Defendants argued that there had not been a change in detention policy and that INS officials continued to have the same discretion to grant parole. Plaintiffs' Exhibit 1, for example, was offered to prove both that the defendants had a policy and that this policy discriminated against Haitians.

This Court does not think it is appropriate to further protract the matter by attempting to identify which specific hours and expenses should be eliminated from a fee award because they are attributable to the equal protection claim and not the APA claim. Rather, one of the factors the Court will consider in determining the ultimate fee award in this case is that the government was not unreasonable in defending against the equal protection claim. Any award will be adjusted downward accordingly. The Court is of the opinion that the percentage of total

attorney time that should be attributed to each claim can be approximated.

The Court will conduct a hearing to determine the total number of hours that can be considered "reasonably expended" on the litigation and a reasonable hourly rate for the attorneys involved. In addition to the downward adjustment discussed above, the Court will consider whether the fees should be enhanced for any reason pursuant to 28 U.S.C. 2412(d)(2), including the excellent results achieved by plaintiffs' counsel, the limited availability of qualified counsel for this kind of litigation, and the delay in payment of this award.[8]

DONE AND ORDERED in Chambers, at Miami, Florida, this 6th day of December, 1985.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
United States District Judge

Copies to all counsel of record.

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[8] Because the litigation before the Supreme Court concerned only the equal protection claim, the plaintiffs are not entitled to compensation under the EAJA for their efforts in that Court. However, the plaintiffs have pointed out that the government apparently changed its litigation position as the case progressed. Before the Supreme Court, the government argued that the INS was precluded by statute and regulations from making nationality-based distinctions. Based upon this representation, the Court found that it was unnecessary to reach the constitutional issues. At trial, however, the government argued to the contrary—that nationality can be a factor in determining whether an alien is paroled.

This Court recognizes that if the government had taken the position it now takes during the trial, the constitutional claims may not have needed to be litigated. The Court will therefore consider the government's apparent change in position in adjusting the final fee award.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5887
D.C. Docket No. 81-1260

MARIE LUCIE JEAN, ET AL., PLAINTIFFS-APPELLEES

versus

ALAN C. NELSON, ET AL., DEFENDANTS-APPELLANTS

Appeals from the United States District Court
for the Southern District of Florida

[Filed Feb. 2, 1989]

Before KRAVITCH and CLARK, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

KRAVITCH, Circuit Judge, concurred in part and dissented in part and filed an opinion.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part and VACATED; and that this cause be and the same is hereby REMANDED to said District Court for recalculation of attorney's fees and expenses in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

Entered: December 27, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5887

MARIE LUCIE JEAN, ET AL., PLAINTIFFS-APPELLEES

versus

ALAN C. NELSON, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Southern District of Florida

[Filed May 17, 1989]

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion December 27, 1988, 11 Cir., 198__, __ F.2d __).
(May 17, 1989)

Before KRAVITCH and CLARK, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

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